136-393

TRANSCRIPT OF RECORD.

136-398

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 293.

THE TEXAS AND PACIFIC RAILWAY COMPANY AND JOHN C. BROWN AND LIONEL A. SHELDON, RECEIVERS OF THE TEXAS AND PACIFIC RAILWAY COMPANY, APPELLANTS,

vs.

THE CITY OF MARSHALL.

FILED FEBRUARY 3, 1887.

No. 1105.

THE CITY OF MARSHALL, APPELLANT,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY AND JOHN C. BROWN AND LIONEL A. SHELDON, RECEIVERS OF THE TEXAS AND PACIFIC RAILWAY COMPANY.

FILED MARCH 5, 1889.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 22, 1889.

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1 { Seal United States Circuit Court, Eastern District of Texas, at Jefferson. }

UNITED STATES OF AMERICA, *Eastern District of Texas,* } ss:

Be it remembered that in the circuit court of the United States of America for the eastern district of Texas, at a regular term of said court begun and held at Jefferson, Texas, in and for said district, on the thirteenth day of September, A. D. 1886, and ending on the eighth day of October, A. D. 1886, before the Honorable Chauncy B. Sabin, judge of said court, the following proceeding- were had on the equity side of said court, to wit:

Application for Appeal.

CITY OF MARSHALL
vs.
TEXAS AND PACIFIC RAILWAY CO. and JOHN C. BROWN and LIONEL A. SHELDON, Receivers of The Texas & Pacific Railway Co. } Ch'y, 18.

Now come the defendants in above case, Texas & Pacific R'lw'y Co. and John C. Brown and Lionel A. Sheldon, receivers, and pray this court to grant them an appeal from the decree rendered in above cause, and that the court fix the amount of appeal bond to be given by defendants on appeal.

F. H. PRENDERGAST,
Counsel for Defendants.

2 F. H. Prendergast on oath says the value of the matter in controversy in the above cause exceeds in amount, exclusive of costs, the sum or value of five thousand dollars.

F. H. PRENDERGAST,

Sworn to and subscribed before me this the 7th day of October, A. D. 1886.

W. E. SINGLETON,
Circuit Clerk.

Filed Oct. 7th, 1886.

W. E. SINGLETON, *Cl'k.*

Order.

THE CITY OF MARSHALL
vs.
TEXAS & PACIFIC RAILWAY CO. *et al.* } Ch'y, 18.

THURSDAY, *Oct. 7th*, '86.

Now, on this day, come the defendants, The Texas & Pacific Railway Company and John C. Brown and Lionel A. Sheldon, as re-

ceivers of said railway, and present their application for appeal in open court; which said appeal is granted by the court and bond fixed at five hundred dollars.

Defendants' Appeal Bond.

Know all men by the- presents that we, The Texas & Pacific Railway Co. and John C. Brown and Lionel A. Sheldon, receivers, are held and firmly bound unto The City of Marshall in the full and just sum of five hundred dollars, to be paid to the said The City of Marshall, — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and
3 severally, by these pressnts.

Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at a session of the United States circuit court for the eastern district of Texas, held at Jefferson, in a suit depending in said court between The City of Marshall, plaintiffs, and The Texas and Pacific Railway Co. and John C. Brown & Lionel A. Sheldon, receivers of said railway, defendants, a decree was rendered against the said The Texas & Pacific Railway Co.; and John C. Brown & Lionel A. Sheldon, receivers of said railway, having obtained an appeal of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said City of Marshall, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next, 1887:

Now, the condition of the above obligation is such that if the said The Texas & Pacific Railway Co. and John C. Brown & Lionel A. Sheldon, receivers of said railway, shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

4 THE TEXAS & PACIFIC RAILWAY CO.,
By JOHN C. BROWN, *Vice-Pres't.* [SEAL.]
JOHN C. BROWN, *Receiver, for the Receivers.*

Sealed and delivered in presence of—
—— ——.

Attest:
W. H. ABRAMS, *Ass't Sec'y.*
Receivers, 1886, T. & P. r'lway.
L. KAHN.
J. P. CRAVER.

Approved by—
—— ——.

Sworn to and subscribed before me this Oct. 15th, 1886.
J. P. ALFORD,
Cl'k County Court, Harrison County, Tex.

THE STATE OF TEXAS, }
Harrison County. }

I, J. P. Alford, clerk of the county court of Harrison county, Texas, do hereby certify that I am well acquainted with L. Kahn & J. P Craver, whose names are signed to the appeal bond in the case of The City of Marshall *vs.* The Texas and Pacific Railway Company & Brown & Sheldon, receivers, and said L. Kahn and J. P. Craver are each worth above exemptions at least five hundred dollars, and if said bond were presented — this office I would approve the same.

[SEAL.] Given under my hand and seal of office, at Marshall, Texas, this October the 16th, A. D. 1886.

J. P. ALFORD,
Clerk County Court, Harrison Co., Texas.

5 Approved.
Galveston, Texas, Oct. 30th, 1886.

CHAUNCY B. SABIN,
U. S. Dist. Judge for the Eastern Dist. of Tex.

Filed November 4th, 1886.

W. E. SINGLETON, *Clerk.*

Defendants' Citation.

The United States of America to the City of Marshall, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2nd Monday of October next, 1887, pursuant to an appeal obtained from the United States circuit court of eastern district of Texas, at Jefferson, on October 7th, 1886, wherein The Texas & Pacific Railway Co. and John C. Brown and Lionel A. Sheldon, receivers of said railway, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants on Oct. 7th, 1886, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 30th day of October, in the year of our Lord one thousand eight hundred and eighty-six.

CHAUNCY B. SABIN,
U. S. District Judge for the Eastern District of Texas.

6 I accept service of this citation on appeal November 1st, 1886.

JAMES TURNER.
BOOTY & YOUNG,
For Complainants.

Filed November 4th, 1886.

Defendants' Assignment of Errors.

In United States Circuit Court for Eastern Dist. of Texas, at Jefferson. In Equity.

CITY OF MARSHALL
vs.
THE TEXAS & PACIFIC R'LWAY CO.; JOHN C. BROWN & LIONEL A. SHELDON, Receivers of said Railway

Now come the Texas & Pacific Railway Co., John C. Brown and Lionel A. Sheldon, receivers of said railway, and assign the following errors committed by the court in rendering the decree in above cause on Oct. 7th, 1886:

I.

The court erred in perpetuating the injunction against the removal of the "main machine shops and car works" from Marshall, because the evidence did not show that any of said shops had been removed or threatened to be removed. This portion of the decree is also erroneous because it does not define what constitutes the main machine shops and car works.

II.

The court erred in perpetuating the injunction against the
7 removal of the "Texas office" from Marshall, because neither the evidence nor the decree shows what constitutes the "Texas office," and the defendants cannot know when they are complying with the decree or when they are violating it; and, further, the plaintiff's allegations and evidence tend to show that what they call the "Texas office" has long since been removed from Marshall and is not now at Marshall.

III.

The court erred in enjoining the removal by the defendants of the "eastern terminus" of the Texas & Pacific railway from Marshall, because neither the bill nor answer nor evidence nor the decree shows what constitutes the "eastern terminus," and because the eastern terminus was fixed at Marshall by the last section of the original charter of the Tex. & Pac. R'lway Co. for the two Louisiana roads therein named to Marshall for a connection and to prevent the Tex. & Pacific R'lway Co. from building on to Louisiana to connect with said roads, and fixing the eastern terminus at Marshall was not done to control the internal affairs of said Tex. & Pac. R'lway Co.

IV.

The court erred in enjoining — of the main machine shops and car works from Marshall, because the court cannot compel

8 the defendants to maintain and operate said shops at Marshall, and, not being able to decree a performance of the whole contract, it cannot decree a performance of a part.

V.

The court erred in making any decree against the Texas & Pacific R'lway Co., because it appears that said railway and all of its property are in the hands of the defendants Brown & Sheldon, appointed by the United States circuit court of the eastern dist. of Louisiana, and the said Texas & Pac. R'lway Co. are incapable of performing any decree that may be pronounced against them.

VI.

The court erred in rendering any decree against the defendants, John C. Brown & Lionel A. Sheldon, as receivers, because said decree involves the management and control of said railway, of which they are receivers, and they are under the control of the United States circuit court for the eastern district of Louisiana, and not under control of the court making this decree.

VII.

Said decree is erroneous because the contract sued on and proved did not obligate the Texas & Pacific Railway Co. to keep its offices and shops at Marshall for all time.

9 VIII.

The court erred in purpetuating the inju-ction, because while it is in form an inju-ction the decree is in effect a decree for specific performance of a contract, which involves the employment of large numbers of men for an indefinite length of time, and also involves the exercise of personal skill and cultivated judgment and constant supervision, so that the court has no adequate means of effectually enforcing its decree.

IX.

The court erred in purpetuating the injunction, because the contract sued on, in so far as it attempts to prevent defendants from locating their shops and offices elsewhere than at Marshall, is void as being against public policy.

These defendants, now appellants, pray the Supreme Court of the United States to reverse the decree rendered in the above cause on October 7th, 1886, by the circuit court for the eastern district of Texas, and to remand the cause, with instructions to said circuit court to dismiss the bill.

F. H. PRENDERGAST,
Counsel for Defendants, Appellants.

Filed Nov. 4th, 1886.

W. E. SINGLETON, *Clerk.*

10 *Plaintiff's Application for Appeal.*

Circuit Court, Eastern District of the State of Texas. October Term, 1886.

THE CITY OF MARSHALL
vs.
THE TEXAS & PACIFIC R'LWAY CO. AND ITS RECEIVERS. } Ch. No. 18.

To the Hon. C. B. Sabin, judge of said court:

The plaintiff in the above entitled and numbered cause prays your honor to allow and grant an appeal in said cause in favor of the complainant, The City of Marshall, to the Supreme Court of the United States of America from the final decree rendered in said case this day, the 7th of October, 1886, as against the Texas & Pacific Railway Company and its receivers, Lionel A. Sheldon and John C. Brown; and complainant further asks your honor to fix the amount of the appeal bond.

JAMES TURNER AND
BOOTY & YOUNG,
For Complainant.

Filed Oct. 7th, 1886.

W. E. SINGLETON, *Clerk.*

Order of Court.

THE CITY OF MARSHALL
vs.
THE TEXAS & PACIFIC R'LWAY CO. *et al.* } Ch'y, 18.

THURSDAY, *Oct. 7th*, 1886.

Now, on this day, comes the complainant, The City of Marshall, and also presents its application for appeal in open court, which said appeal is granted by the court, and bond fixed at the sum of five hundred dollars.

11 *Plaintiff's Appeal Bond.*

Supreme Court of the United States.

United States Circuit Court for the Eastern District of the State of Texas, Holding Sessions at Jefferson, Texas.

THE CITY OF MARSHALL
vs.
THE TEXAS & PACIFIC RAILWAY CO.; JOHN C. Brown and Lionel A. Sheldon, as its Receivers; Jay Gould, H. M. Hoxie, and Wm. Kerrigan, Defendants. } Ch'y Docket No. 18

Know all men by these presents that we, "The City of Marshall, in Harrison county, Texas," a municipal corporation, duly organized

under the laws of the State of Texas, as principal, and —— —— and —— ——, as sureties, are held and firmly bound unto the Texas and Pacific Railway Company and John C. Brown and Lionel A. Sheldon, as its receivers, and their successors and heirs, in the sum of five hundred dollars, to be paid to the said Texas and Pacific Railway Co. and John C. Brown and Lionel A. Sheldon, its receivers; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this the 28th day of October, A. D. 1886.

Whereas the above-named City of Marshall, in Harrison
12 county, Texas, hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the eastern district of Texas on the 7th day of October, A. D. 1886, at Jefferson, in the State of Texas:

Now, therefore, the condition of this obligation is such that if the above-named City of Marshall shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise remain in full force and effect.

THE CITY OF MARSHALL, [SEAL.]
By JAS. H. CARTER, *Mayor.* [SEAL.]
WM. M. JOHNSTON.
[SEAL.] H. J. ROSBOROUGH.
W. S. ALLEN.
J. F. WOMACK.
J. WEISMAN.
JOE LOTE.
R. C. GARRETT.
J. S. WAGNER.
E. KEY.
TOM A. ELGIN.

STATE OF TEXAS, }
Harrison County. }

I, W. T. S. Keller, judge of the county court of Harrison county, Texas, do hereby certify that the above bond is good for the full amount of the penalty; the sureties on same are worth at
13 least forty thousand dollars over and above their liabilities and exemptions.

[SEAL.] To certify which I hereto set my hand and seal of office this 29th day of October, 1886.

W. T. S. KELLER,
County Judge, Harrison County, State of Texas.

Approved.
Galveston, Texas, October 30th, 1886.

CHAUNCEY B. SABIN,
U. S. District Judge for the Eastern Dist. of Texas.

Filed November 4th, 1886.

W. E. SINGLETON, *Clerk.*

Plaintiff's Citation on Appeal.

The United States of America to the Texas & Pacific Railway Company and John C. Brown and Lionel A. Sheldon, receivers of said company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2nd Monday of October next, 1887, pursuant to an appeal obtained from the United States circuit court of eastern district of Texas, at Jefferson, on October 7th, 1886, wherein The City of Marshall is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant on Oct. 7th, 1886, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

14 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 30th day of October, in the year of our Lord one thousand eight hundred and eighty-six.

CHAUNCEY B. SABIN,
U. S. District Judge for the Eastern Dist. of Texas.

I accept service of this citation on appeal.
Nov. 1st, 1886.

F. H. PRENDERGAST,
Counsel for Defendants.

Filed November 4th, 1886.

W. E. SINGLETON, *Clerk.*

Plaintiff's Assignment of Errors.

Circuit Court of the United States, Eastern District of Texas.

THE CITY OF MARSHALL
vs.
THE TEXAS AND PACIFIC RAILWAY CO. *et al.* } Ch'y No. 18.

And now comes the plaintiff and makes the following assignment of errors:

1st. The court erred in refusing to issue a mandatory writ of injunction compelling the defendants to restore and bring back to the city of Marshall the departments of the Texas office of the Texas and Pacific Railway Company, which departments were the land office, the auditor's office, the general passenger agent's office, the general freight agent's office, the vice-president's office, and other offices forming parts of said Texas office, and all of which were moved away from the city of Marshall in violation of the contract set out in said bill of complaint of complainant.

15 Said court erred in refusing to issue an injunction restraining the defendants from maintaining said above-named offices at any other points or places than at Marshall, Texas.

3rd. The court erred in refusing to issue a mandatory writ of injunction compelling said defendants to keep and maintain the termini of its freight divisions at said city of Marshall.

4th. Said court erred in not issuing an injunction restraining the defendants from maintaining its termini of the freight divisions at any other place than at the city of Marshall.

The supreme court is hereby asked to reform the decree rendered by the circuit court in the above-entitled cause in accordance with the foregoing assignment of errors and direct the circuit court of eastern district of Texas to enter a decree in accordance with the above assignments of error.

JAMES TURNER,
BOOTY & YOUNG,
For the Complainant.

Filed November 20th, 1886.

W. E. SINGLETON, *Clerk.*

Original Petition.

THE STATE OF TEXAS, }
Harrison County. }

District Court. February Term, A. D. 1886.

To the Hon. J. G. Hazlewood, judge of the fourth judicial district:

The City of Marshall, in Harrison county, in said State of Texas, a body politic, duly incorporated under and by virtue of the
16 laws of said State, and which is plaintiff, complaining of the Texas and Pacific Railway Co., also a body politic, duly incorporated under and by virtue of an act of the Congress of the United States of America and the amendments thereto, and by virtue of various acts of the Legislature of the said State, and which is defendant, and the legal domicil of which is in said county, through which it operates a line of railway, and shows unto your honor—

That said defendant, on the — day of March, A. D. 1872, through its agents, proposed to the people of the county of Harrison to establish permanently the eastern terminus of the Texas and Pacific Railway at the city of Marshall, the county site of said county, and locate permanently at said city, in said county, its legal domicil, Texas office, main machine shops, and car works, and thereby secure at said city the connections with said terminus provided for by the act of Congress incorporating said defendants, if the people of said county would donate to said defendant three hundred thousand dollars in the bonds of said county, payable in gold coin, having thirty years to run and bearing seven per centum per annum interest, and levy a tax in the manner required by an act of the Legislature of the State of Texas approved April 12th, 1871, to provide for the payment of said bonds.

That the people of said county, influenced by said proposi-
17 tion and the representations of said defendant, of the great benefits which would accrue to the said city and county from

the acceptance of said proposition, and in compliance with the terms thereof by said county, did, in conformity with the aforesaid act of the Legislature (of the State of Texas, entitled "An act to authorize counties, cities, and towns to aid in the construction of railroads and other works of internal improvements," approved April 12th, 1871), donate to the said defendant the said three hundred thousand dollars in bonds as aforesaid (which bonds were issued by the said county of Harrison in accordance with the provisions of said act of the Legislature aforesaid, and were registered as required by said act, and were delivered to and received by the said defendant); that said defendant, after having made said proposition and after the same was accepted by said county as aforesaid, and before said defendant on its part would comply with said proposition, on or about the — day of June, 1872, required further that said city should donate to defendant sixty-six acres of land, situated within the corporate limits of said city, whereon to locate the main machine shops, car works, offices, and depots of said defendant; that plaintiff, being desirous to secure the benefits represented as aforesaid, acceded to said requirement, and, in accordance with the aforesaid act of the Legislature of the State of Texas, donated sixty-six acres of land to said
18 defendant, which cost plaintiff sixty thousand dollars or more; and that plaintiff then and there executed to defendant a deed conveying said land to said defendant, by virtue of which said deed defendant took possession of said land and still has the occupation and use of same for the aforesaid purposes.

The plaintiff annexes to its petition a copy of the correspondence between the plaintiff, through its agents, and Thomas A. Scott, the then president of defendant company, and who represented defendant, and which is marked Exhibit- A and B and made a part of this petition; that said defendant, after having so received said deed and taken possession of said land, immediately erected thereon its main machine shops, round-houses, freight and passenger depots, general offices, blacksmith shops, foundries, and side tracts, which are of the value of one hundred thousand dollars or over, and which are of the capacity sufficient for the employment of twenty-five hundred men, and have used said buildings and improvements for the purposes intended from the date of their erection up to about the — day of September, 1881, whereby great benefits accrued to plaintiff in the increase of its population, the rapid and continuous increase of the value of property situated within its limits, the increase of its trade, and of prosperity generally.

That from the erection of said buildings up to the date last aforesaid the increase of the population of said city, the plaintiff,
19 was from about three thousand and five hundred to about eight thousand; the increase of the taxable values in said city was from about one quarter of a million of dollars to about one and three quarters of a million of dollars, and the increase of business was at least three hundred per centum.

That from the time of the execution of said agreement between plaintiff and defendant up to the year 1881, during which period Thomas A. Scott was president of defendant company, said defend-

ant kept said agreement in good faith by complying with all of its terms; but about said year one Jay Gould, representing himself and a syndicate of capitalists, got possession of said defendant's railway, and was elected president of the defendant company, and has so continued until this day.

Now, the plaintiff charges that very soon after said Gould and his associates got possession of said defendant's railway, the contract hereinbefore set out being in full force, defendant, on or about the — day of September, A. D. 1881, removed its auditor's office and all persons employed therein from the said city of Marshall to the city of Saint Louis, in the State of Missouri; that said defendant, at and prior to said time, kept in its said auditor's office about one hundred employees, who lived in said city of Marshall, and to whom defendant disbursed in wages about seven thousand and five
20 hundred dollars every month; that by reason of the location of said auditor's office in said city all claims accruing against said defendant, wherever originating, were audited in said office in said city, and all claims in favor of the employees of defendant in said city, which numbered about twelve hundred, were audited in said office and paid in said city. The total sum so paid to said employees and disbursed in Marshall amounted to about seventy-five thousand dollars every month.

That when said defendant was about removing said auditor's office the plaintiff, through a committee of its citizens, *who* called on one H. M. Hoxie, who was the then vice-president and general superintendant of the defendant company, and protested against said removal as being against said contract and in violation of the agreement hereinbefore set out; but said Hoxie then and there falsely and fraudulently represented to said committee that it was necessary to remove said office from the city of Marshall to said Saint Louis; that no other employees or offices would be removed from said city, and that he would, for said defendant, bring to said city two men in place of every one removed by defendant with its auditor's office, and that defendant would also enlarge its then shops, and that said plaintiff was thereby induced to take no measures to prevent the removal of said office; and plaintiff charges that
21 said defendant did not increase said shops, as promised by said Hoxie, nor increase the number of its employees, but, on the contrary, from time to time since said date has removed machinery in large amounts from said shops to other cities and towns, and has decreased the number of its employees in said shops from said date until this time, when there is not more than one-half of the number there was in said shops when said false and fraudulent promises were made by said Hoxie.

Petitioner charges that about the same time that the auditor's office was removed from Marshall the said defendant also changed the termini of its Eastern or Northern Division (which had been from Texarkana to Marshall) from Texarkana to Longview; that when its Eastern Division terminus was at Marshall a large number of employees, as conductors, engineers, firemen, brakemen, and other train employees, had their homes in Marshall and contributed

largely to its trade and general business prosperity, and that by the change of said terminus, which plaintiff charges was in violation of the contract hereinbefore set out and was done with the wicked and fraudulent intent on the part of said defendant of injuring the plaintiff, as destroying its prosperity as a city, the plaintiff was deprived of a large number, to wit, two hundred or more, of its population, and its trade and business was diminished to a large extent, but precisely how much plaintiff is unable to state.

22 And plaintiff states that it took no steps at that time to prevent the change of said division terminus because of the false and fraudulent promises and representations of said defendant, made by the said H. M. Hoxie as aforesaid, by means whereof the said plaintiff was misled and deceived, to its injury. Plaintiff charges that any change of said division terminus was in violation of the contract aforesaid, because by virtue thereof, as well as by its express terms and by express provision of the acts of Congress and of the Legislature of Texas incorporating the said defendant, this plaintiff was made and established as the eastern terminus of the Texas and Pacific railway, from all which it necessarily resulted that the said plaintiff should be and was the terminus of a passenger and freight division of the said defendant; that about the same time the auditor's office was moved the defendant, without the knowledge of the plaintiff, and sur-epticiously, moved the vice-president's office from said city of Marshall to the city of Saint Louis, in Missouri.

That the following-named offices, which constituted a part of the Texas office of the defendant, were moved from the said city of Marshall by said defendant to various points, as given below, about the following dates: The general freight office was moved in November, 1882, to the city of Dallas, Texas, and from the last-named place to Galveston, Texas.

23 The land office was moved in November, 1883, to said city of Dallas; the general passenger office was moved in November, 1884, to Galveston, in the State of Texas; the cashier's and paymaster's office was moved to the said city of Saint Louis about the first day of November, 1884; the general stock and claim agent's office was moved to said city of Dallas in the month of October, 1885; the office of the general master mechanic and superintendent of machinery was moved to the said city of Saint Louis in the summer of 1885, and the office of the division superintendent of the New Orleans Division was moved to the city of New Orleans, in the State of Louisiana, in the fall of 1885; that the removals of all of said offices, except the auditor's office and division terminus, were made by said defendant surrepticiously and without the knowledge of the plaintiff and with intent to destroy the business and general prosperity of plaintiff by taking away from said city of Marshall large numbers of its employees, the population of said city, and by transacting business and making disbursements, which should — and were before said removals made in said city at the Texas office of said defendant, at various other places and cities, as above enumerated; and plaintiff here

avers that the number of employees who have left in conse-
24 quence of said removals is about one thousand and the number of persons not connected with defendant's road who have left in consequence of said removals is about one thousand; that plaintiff did not know of the removal of said offices, except the auditor's office and the division terminus, at the time they were made, and did not discover that such removals had been made until a long time afterwards, and the plaintiff was induced not to take any steps at the time of the discovery of such removals to redress the said violations of the aforesaid agreement and enforce the observance of said contract by reason of the aforesaid false and fraudulent representations of said Hoxie and various other representations and promises made by said defendant to plaintiff from time to time during the period covered by said removals as above given, which promises were confirmatory of the aforesaid representations of said Hoxie, and were also false and fraudulently made, and by a pretended desire, falsely and fraudulently held out by said defendant, to purchase other land on which to erect additional shops and thereby fully and fairly carry out the representations of the said Hoxie that the enlargement of the shops of said defendant and the increased number of employees therein would much more than compensate plaintiff for the loss and injury caused by all of the removals hereinbefore referred to.

That said plaintiff is informed and believes and therefore
25 charges that said defendant from time to time since the — day of September, 1881, up to the present time has moved various pieces of valuable and important machinery from the shops in Marshall to various places along its line away from said city fraudulently and for the purpose of avoiding the performance of the aforesaid contract, and thereby injuring said city; that plaintiff is unable to specify the pieces of machinery so removed, because it has no means of knowledge, and the same were surreptitiously removed, but it charges that fully one-fourth of the machinery which was in said shops on the first day of September, 1881, and which was of the reasonable value of one hundred thousand dollars, has since been removed from said shops, and that no new machinery has since said time been placed in said shops, by all of which said defendant has continuously reduced the number of its mechanics and other workmen in said shops during said period until there is now only about one-half the number there was in them in 1881.

That said plaintiff was not informed of the removals of said machinery from the shops of defendant at Marshall at the time they were made, and did not have notice of same or any of them until a short time ago, to wit, on or about the first day of September, 1885; that in consequence of the removals of said machinery said defend-
ant has sent most of its rolling stock which needed repairs to
26 Saint Louis, Missouri, and other points away from the city of Marshall for the purpose of having the necessary work done on them, and that defendant, in consequence thereof, continued to send such rolling stock to other points, by all of which said defend-

ant has continually reduced its employees in said shops and damaged the plaintiff thereby both in its trade and population.

The plaintiff further avers that in the year 1873 said defendant, in accordance with its aforesaid contract, in part and as required by said agreement, among other things constructed in the city of Marshall a large and commodious three-story building, with fire-proof vaults throughout, and all necessary and convenient appertenances, for the purpose of providing a general office and headquarters of defendant company, and used said building and appertenances for said purpose up to the year 1881, and from that time up to the present defendant removed one office after another from said city of Marshall until on the — day of March, 1885, when said building was entirely unoccupied by defendant for any office or other purpose, and said building was, on the — day of March, 1885, by defendant converted into a hospital for the care and treatment of its employees who get sick or injured in its service; and said plaintiff charges that said hospital is fast becoming and will soon be a common nuisance
27 to the citizens of the plaintiff living in the neighborhood of same.

The plaintiff further avers that said defendant has now at Marshall a general superintendant, one division superintendant of the Eastern Division of the defendant's road in Texas; the superintendant of bridges and buildings, who is also the chief engineer of defendant's road, and the telegraphing department of defendant; in fact, all of whom have offices in the city of Marshall and are now occupying same; and plaintiff charges that said officers and departments are now occupying temporary quarters and the defendant is preparing to remove them to some other point away from the city of Marshall, and unless restrained will do so; that said defendant is also threatening to remove from said city of Marshall the remaining shops and machinery now situated in Marshall, and unless restrained will do so. The plaintiff charges that the removals of said offices, machinery, and employees as hereinbefore fully set out and the threats of said defendant to remove the remaining offices and shops were and are all made and done by the said Jay Gould and his aforesaid associates with a malicious intent to injure said plaintiff and in pursuance of a settled purpose, conspiracy, and combination to ruin the plaintiff in business, population, commercial trade, and prospects. The plaintiff charges that the defendant pre-
28 tends that all of the aforesaid wrongful acts are necessary; but the plaintiff avers that said pretended necessity arises from the unlawful act of said defendant, for that heretofore, to wit, about the year 1881, there was formed in Texas an unlawful combination of railroads, whereby the defendant railway company and several other competing lines of railway in Texas are combined under one management with certain other railroads outside of Texas, known as the Gould system of railroads, and that the removal of the shops and offices aforesaid was and is necessary to combine them with the lines, shops, and offices of said other railroads, and it is the purpose of said defendant and its other associates so to do; and such pretended necessity of removal is created by the

defendant in its unlawful intent and purpose to combine under a common management with such other roads, all of which is and was in plain violation of the constitution and laws of the State of Texas.

And the plaintiff further avers that the damages which it has sustained up to the present time by reason of the wrongful acts hereinbefore set out amounts to one million dollars at least and cannot be fully compensated by any amount of money, and owing to the peculiar circumstances of the contract hereinbefore set out said injuries are constantly recurring and are continuous in their nature and will continue to accrue from time to time for all time to come, and therefore said damages and injuries are irreparable and incapable of estimation.

Plaintiff avers that the defendant railway company is under the management and control of a general superintendant, whose name is Warder Cumming, and that the legal principal office of said defendant for the transaction of its business in Marshall, Harrison county, Texas, and that said office is occupied by said Cumming, who resides in said city and county and State, and that said defendant company has also a local agent in said city, county, and State, whose name is William P. Hudgins, who is a resident citizen of said city, county, and State.

In consideration of the premises, and for that the plaintiff is remediless according to the strict rules of the common law, the plaintiff prays that your honor will issue your honor's gracious writ of injunction enjoining and restraining the defendant and all its agents and servants from removing from the city of Marshall all of its offices, shops, and machinery and portions of the same, which are now in said city and have not heretofore been removed until the further order of this court to be made herein, and that this writ of injunction may be served upon the defendant at its office in the said city of Marshall, as required by law, and upon Warder Cumming, general superintendant, who resides in said city of Marshall, Harrison county, Texas, and upon Jay Gould, president of said defendant company, who resides in the city, county, and State of New York, and upon H. M. Hoxie, John C. Brown, and —— Carrigan, who are officers of said defendant company, who are resident citizens of the city and county of Saint Louis, in the State of Missouri.

Plaintiff further prays that upon the final hearing of this cause the restraining injunction hereinabove prayed for may be made perpetual, and that upon said final hearing your honor will decree that the said defendant shall be required in all respects to fulfill and perform its agreement and contract hereinbefore fully set forth, and that your honor will issue a mandatory writ of injunction requiring the said defendant to restore and re-establish in the city of Marshall, Harrison county, Texas, all the offices, shops, and machinery which have been removed therefrom.

Plaintiff prays that the defendant may be served with citation, as required by law, by leaving a copy thereof at the defendant's legal principal office, in the city of Marshall, Harrison county, Texas, or

upon the said defendant's local agent in said city, county, and State, whose name has heretofore been stated, and for all such further and other relief as the plaintiff may be entitled to in law or equity.

WILLIAM STEDMAN,
JAMES TURNER,
31 JOHN T. PIERCE,
BOOTY & YOUNG,
F. B. SEXTON,
Counsel for Plaintiff.

THE STATE OF TEXAS, }
County of Harrison. }

Before me, the undersigned authority, personally appeared Henry B. Pitts, mayor of the city of Marshall, and who is authorized to represent said city of Marshall in the foregoing suit, and says that the facts and allegations of the foregoing petition are true.

H. B. PITTS,
Mayor of Marshall, Texas.

Sworn to and subscribed before me this 25th day of November, 1885; to certify which I hereto sign my name and affix my official seal the same day and date.

JOHN B. CARTER,
Notary Public in and for Harrison County, Texas.

EXHIBIT A.

MARSHALL, TEXAS, *June 26th*, 1872.

Col. Thomas A. Scott, president of the Texas & Pacific Railway Company, Philadelphia, Penna.

SIR: Pursuant to your request we now present to you, to be laid before the board of directors for the Texas & Pacific Railway Company, a written statement of the agreement made at Mrs.
32 King's Hotel, in this city, on the 22nd inst., between yourself, on behalf of said railway company, and the undersigned, on behalf of the city of Marshall.

The county of Harrison (of which the city of Marshall is the county seat) has determined, in the manner required by an act of the Legislature of the State of Texas passed April 12th, 1871, to donate to said Texas & Pacific Railway Company three hundred thousand dollars in the bonds of said county, payable in gold coin, having thirty years to run, & bearing seven per centum interest per annum, and to levy a tax in the manner required by said act to provide for the payment of the principal and interest of said bonds upon the condition that said company shall establish its eastern terminus and Texas office at the city of Marshall, and shall locate and construct at said city its main machine shops and car works, thereby securing at said city the connections with said terminus provided for by the act incorporating said Texas and Pacific Railway Company and an act supplemental thereto.

We understand that a full transcript of the orders and decrees of the county court of Harrison county in regard to this matter has been furnished you.

In addition to this, the city of Marshall will donate to said company sixty-six acres of land at the place and in the shape designated by you on the map of said city, whereon to locate the main
33 machine shops, car works, and depot of said company at said city.

The city of Marshall will procure said land by issuing its bonds in accordance with the provisions of the act of the Legislature of Texas already referred to, which bonds will be used in the purchase of said land.

The citizens of Marshall have already undertaken to cash said bonds to an extent sufficient to purchase all of said land which cannot be procured by donation directly from the owners thereof.

The details of acquiring the title to said land by your company will be attended to by the city, and were explained in our conversation with you.

In consideration of the donation of the said sum of three hundred thousand dollars and said sixty-six acres of land, the said Texas and Pacific Railway Company will permanently establish its eastern terminus and Texas office at the city of Marshall, and will also establish and construct at said city the main machine shops and car works of said railway company.

Awaiting your reply, we are,

Respectfully, your ob't servants,

F. B. SEXTON,
E. D. BLANCH,
M. D. ECTOR,
Committee on Part of City of Marshall.

34 EXHIBIT B.

Texas & Pacific Railway Company, office of the president.

PHILADELPHIA, *July 16th*, 1872.

F. B. Sexton, E. A. Blanch, M. D. Ector, committee on behalf of the city of Marshall, Texas.

GENTLEMEN: I am in receipt of your favor of June 26th, setting forth arrangement between your committee and myself, as president of the Texas & Pacific Railway Company. The statement, as you make it, is satisfactory, and I will have the matter ratified at the first meeting of our board of directors; but the absence of Judge Pierrepont and Mr. Stebbins in Europe for a few weeks to look after our financial matters may prevent me from getting a quorum of our directors together, but in due time it shall all be arranged.

Very respectfully, THOMAS A. SCOTT, *Pres.*

Order.

THE CITY OF MARSHALL
vs.
THE TEXAS & PACIFIC RAILWAY CO.

In chambers, at Center, Shelby county, Texas.

The clerk of the district court of Harrison county, Texas, will issue the injunction prayed for in the above petition, restrain-
35 ing the defendant, The Texas & Pacific Railway Company, its officers, agents, and employees, from removing any machinery from the shops of said defendant in said city of Marshall, contrary to the agreement set forth in said petition; also from removing from said city of Marshal the office of the general superintendant of defendant company, the office of the superintendant of bridges & buildings, and the office of the chief engineer of said defendant, the office of the telegraphing department, the office of the division superintendant of the Eastern Division of defendant's road in Texas, or any other office of said defendant now remaining in said city, and a part of its Texas office, upon the complainant executing to defendant a bond, with two or more good and sufficient sureties, in the sum of twenty thousand dollars, conditioned as required by law, and that said injunction be served upon the parties named and as prayed in said petition.

Done at Center, Shelby county, Texas, this 27th day — November, A. D. 1885.

J. G. HAZLEWOOD,
Judge 4th Judicial District.

Filed December 1st, 1885.

ALEX. S. FIELD,
Clerk D. C., H. Co., Texas.

36 *Writ of Injunction.*

THE STATE OF TEXAS, }
County of Harrison. }

To the Texas and Pacific Railway Company and to Jay Gould, who is the president of said railway company, and to H. M. Hoxie, who is the vice-president of said railway company, and to —— Carrigan, who is general superintendant of the Gould system of railways, of which the Texas & Pacific Railway Company is a part, and to Warder Cumming, who is the general superintendant of the Texas and Pacific Railway Company, and to all the officers, agents, and employees of said Texas and Pacific Railway Company, Greeting:

Whereas the City of Marshall, a municipal corporation of Texas, situated in Harrison county, Texas, has filed its petition in our hon-

orable district court of Harrison county, Texas, against The Texas & Pacific Railway Company, No. 7364, charging that in the year 1872 the county of Harrison donated to the Texas and Pacific Railway Company three hundred thousand dollars in its bonds, due in thirty years, with seven per centum interest in gold, and the city of Marshall donated to said company sixty-six acres of land in the limits of said city, all of which bonds and land were by said company accepted and received; and charging, further, that in consideration of the aforesaid donations said railway company did
37 contract and agree to make the city of Marshall the eastern terminus of its road, to locate and maintain at said city the principal machine shops of its road, and to locate at said city the Texas office of said road; and that said company, in compliance with its contract, did, in 1872 and in 1873, erect its machine shops at Marshall, and did establish at said city its Texas office, and did maintain such shops and offices at said city until the year 1881, at which time said Texas & Pacific railway passed under the control of Jay Gould and certain associates, and did enter into an unlawful combination with certain other competing railways, by the terms of which all of said roads did pass under a common management, known as the Gould system of railways, and that soon thereafter, to wit, in September, 1881, said Gould and his associates did move the auditor's office of said railway to Saint Louis, Missouri, and in 1882 did move the freight department of the road to Galveston, and the passenger department also to Galveston, and in 1883 did move the land department of said road to Dallas, and in 1885 did move the master mechanic's office to Saint Louis, Missouri, and in 1881 did change the terminus of said road by changing the divisions of same from Marshall to Texarkana and Longview, and did at various times
38 after 1881 remove parts of the machinery from the shops at Marshall to other points, in all of which the contract with the city of Marshall was by said company violated, and that there now remains at Marshall only the office of the general superintendant, a division superintendant of bridges and buildings, and the engineer's office and a part of the telegraph department of the road, and that said company is now threatening to remove all of it remaining offices to Dallas, and to remove the machine shops from Marshall to some other point, and praying for an injunction to restrain said defendant company, its servants, agents, and employees, from removing any of its remaining offices from Marshall and from removing its machinery and machine shops from Marshall; and said petition, properly verified, having been presented to the Hon. J. G. Hazlewood, judge of the fourth judicial district, who made his order thereon as follows, to wit:

Order.

THE CITY OF MARSHALL
vs.
THE TEXAS & PACIFIC R'LWAY CO.

In chambers, at Center, Shelby county, Texas.

The clerk of the district court of Harrison county, Texas, will issue the injunction prayed for in the above petition, restraining the defendant, The Texas and Pacific Railway Company, its
39 officers, agents, and employees, from removing any machinery from the shops of said defendant in said city of Marshall contrary to the agreement set forth in said petition; also from removing from said city of Marshall the office of the general superintendant of defendant company, the office of superintendant of bridges and buildings, and the office of chief engineer of said defendant, the office of the telegraph department, the office of the division superintendant of the Eastern Division of defendant's road in Texas, or any other office of said defendant now remaining in said city and a part of its Texas office, upon the complainant executing to the defendant a bond, with two or more good and sufficient sureties, in the sum of twenty thousand dollars, conditioned as required by law, and that said injunction be served upon the parties named and as prayed in said petition.

Done at chambers, at Center, Shelby county, Texas, this 27th day of November, 1885.

J. G. HAZLEWOOD,
Judge 4th Judicial District of Texas.

And whereas — has executed and filed with the clerk of said court a bond in the sum of twenty thousand dollars, made payable and conditioned as required by law and the fiat of the judge: You are hereby commanded that you desist and refrain from removing any of the machinery from the shops of said defendant at Mar-
40 shall; also from removing from Marshall the office of general superintendant of defendant company, and the office of superintendant of bridges and buildings, and the office of chief engineer of said defendant, and the office of the telegraph department of the said railway, and the office of the division superintendant of the Eastern Division of said railway in Texas, or any other office now remaining in said city until the further order of said district court, to be holden in and for the county of Harrison, at the court-house thereof, in the city of Marshall, on the sixth Monday after the first Monday in January, A. D. 1886, it being the 15th day of February, 1886, when & where this writ is returnable.

Test Alex. S. Field, clerk of the dist. court of Harrison
[L. S.] county, and seal of same, at office, in Marshall, this 1st day of December, 1885.

ALEX. S. FIELD,
Clerk D. C., H. Co., Texas.

Sheriff's Return.

Came to hand December 1st, 1885, at 5 o'clock p. m., and executed December 1st, 1885, on Warder Cumming, general superintendant of the Texas and Pacific Railway Compay, in the city of Marshall, Harrison county, Texas, by delivering to him, the said Warder
41 Cumming, in person, a true copy of this writ of injunction.

And further executed December 2nd, 1885, by leaving at the principal office of the Texas and Pacific Railway Company, in the city of Marshall, Harrison county, Texas, a true copy of this writ of injunction during office hours of said company.

S. R. PERRY,
Sheriff of Harrison County, Texas,
By A. S. CURTIS, *Deputy.*

Carrigan not found.

Writ of injunction, issued Dec. 1st, 1885.

ALEX. S. FIELD,
Clerk D. C., H. Co., Tex.

Citation.

THE STATE OF TEXAS, }
County of Harrison. }

To the sheriff or any constable of Harrison county, Greeting:

You are hereby commanded to summon the Texas and Pacific Railway Company by delivering a true copy of the citation to William P. Hudgins, the local agent representing said company in the city of Marshall, Harrison county, Texas, to appear before the district court of Harrison county, Texas, at the court-house, in Marshall, at the next regular term of said court, to be holden on the 3rd Monday in February, 1886, it being the 15th day of February,
42 1886, then and there to answer a petition filed in said court on the 1st day of December, 1885, wherein The City of Marshall is plaintiff and the said Texas & Pacific — Company is defendant, the number of said suit being 7364, the nature of said plaintiff's demand being a suit to recover damages for the breach of a contract made on the — day of March, 1872, by said defendant to locate its Texas office, main machine shops, and car works at said city of Marshall permanently, for which said city gave sixty-six acres of land, which cost said city sixty thousand dollars, in addition to three hundred thousand dollars in bonds donated by the county of Harrison; and for a preliminary injunction to restrain defendant from removing from Marshall any of its offices and machinery, especially the office of the general superintendant of the Eastern Division of said defendant's road, the superintendant of buildings and bridges, who is also chief engineer, and the telegraphing department; and for a mandatory injunction to compel said defendant to bring back to Marshall various offices, constituting part of its Texas

office, which have been removed to various other places, as more fully specified in said petition; and to bring back machinery, &c., and to force said defendant to comply with said contract, said mandatory injunction not to be granted except on final hearing,
43 as per petition will more fully appear. Herein fail not; but have you then and there, before said court, this writ, with your return thereon showing how you have executed the same.

Witness Alex. S. Field, clerk of the district court of Har-
[SEAL.] rison county, and seal of same, at my office, in Marshall, this 17th day of December, A. D. 1885.

ALEX. S. FIELD,
Clerk D. C., H. Co., Texas.

Sheriff's Return.

Came to hand December 17th, 1885, at 10 o'clock a. m., and was executed December 17th, 1885, by delivering to W. P. Hudgins in person, local agent for the Texas and Pacific Railway Company, in the city of Marshall, Harrison county, Texas, a true copy of the within citation during office hours.

S. R. PERRY,
Sheriff of Harrison County Texas,
By H. S. CURTIS, *Deputy.*

Citation issued December 17th, 1885.

ALEX. S. FIELD,
Clerk D. C., H. Co., Texas.

Petition to Remove to U. S. Court.

In District Court of Harrison County, Texas.

THE CITY OF MARSHALL
vs.
THE TEXAS AND PACIFIC RAILWAY CO. } No. 7364.

1. To the honorable district court of Harrison county, Texas:

Now comes The Texas and Pacific Railway Company, the defendant in above case, and shows to the court—

44 That on December 1st, 1885, the plaintiff, The City of Marshall, filed this suit against the defendant, The Texas and Pacific Railway Company, and said suit is now pending in said court undetermined.

2. That plaintiff is a municipal corporation duly incorporated under the laws of the State of Texas.

3. That defendant is a railroad corporation duly incorporated, existing, and organized under and by virtue of certain acts of the Congress of the United States of America, to wit:

An act to incorporate the Texas and Pacific Railway Company, &c., approved March 3rd, 1871, and a supplemental act passed and *and* approved May 2nd, 1872.

4. Your petitioners, the defendants, have a defense to said suit arising under the laws of the United States, to wit, said act of incorporation.

5. This suit is filed by the city of Marshall to recover damages from the Texas and Pacific Railway Company for a breach of contract made in March, 1872, and to enjoin defendant from moving any of its shops, offices, or machinery from Marshall, and to compell defendant to bring back such offices as had removed from Marshall, claiming $— damages, and the value of the matter in controversy in that suit being more than $500.00, exclusive of costs.

45 6. Your petitioner here now tenders bond, with good and sufficient surety, conditioned as required by law for its entering in the circuit court for the eastern district of Texas, on the first day of next term, copies of the record of this court, copies of all process, pleading, depositions, and testimony and other proceedings in this cause.

7. Wherefore your petitioner prays that said bond be accepted and approved, and that this cause be removed to the circuit court of the United States for the eastern district of Texas, and that this court proceed no further in this cause.

F. H. PRENDERGAST,
Attorney for Defendant.

Sworn to and subscribed before me this January 21st, 1886.
ALEX. S. FIELD,
Clerk D. C., H. Co., Texas.

Petition for removal to U. S. court. Filed Jan'y 21st, 1886.
ALEX. S. FIELD,
Clerk D. C., H. Co., Texas.

Bond to Remove to U. S. Court.

In District Court, Harrison County. February Term, 1886.

THE CITY OF MARSHALL
vs.
TEXAS & PACIFIC R'LW'Y CO.

Know all men that we, The Texas and Pacific Railway Company, as principal, and —— ——, as sureties, acknowledge ourselves bound to pay to The City of Marshall, plaintiff in above case, the sum of five hundred dollars, to be well and truly paid to it or its
46 successors or assigns if default be made in the following condition:

Whereas the said City of Marshall has commenced a suit as above styled in the district court of Harrison county, State of Texas, which suit is still pending, against the Texas and Pacific Railway Company, and said defendant has filed its petition and made application to remove said suit to the circuit court of the United States for the eastern district of Texas:

Now, therefore, the condition of this obligation is such that if the said Texas and Pacific Railway Company shall enter in the said circuit court of the United States for the eastern district of Texas, on the first day of its next session, a copy of the record in this suit and pay all costs that may be awarded by said circuit court if said court should hold that said suit was wrongfully or improperly removed thereto, and do all things that may be required to remove this case, then this bond to be null and void; otherwise to remain in full force and effect.

In witness whereof we hereto set our hands this January 21st, 1886.

THE TEXAS & PACIFIC RAILWAY CO.,
By their agent & att'y, F. H. PRENDERGAST.
L. KAHN.
W. B. FRALEY.

Bond for removal to U. S. court. Filed Jan'y 21st, 1886.
ALEX. S. FIELD,
Clerk D. C., H. Co., Texas.

47 *Order of Removal.*

THE CITY OF MARSHALL
vs.
THE TEXAS & PACIFIC RAILWAY CO. } No. 7364.

On this 6th day of March, A. D. 1886, came on to be heard the defendant's petition to remove the above cause to the circuit court of the United States for the eastern district of Texas. The bond presented therewith is approved and the petition is granted, and said cause ordered removed to said United States circuit court, and the clerk will transmit a copy of the record upon the payment of his fees therefor.

THE STATE OF TEXAS,
County of Harrison.

I, Alex. S. Field, clerk of the district court of Harrison county, do hereby certify that the above is a true and correct copy of the order of the district court of said county removing the cause above styled to the United States circuit court for eastern district of Texas, as of record in the minutes of said court.

Test: Alex. S. Field, clerk of the district court of Harri-
[SEAL.] son county, and seal of same, at Marshall, this 13th day of May, 1886.

ALEX. S. FIELD,
Clerk D. C., H. Co., Texas.

Filed May 22nd, 1886.

W. E. SINGLETON, *Clerk.*

48 *Application to Judge Pardee.*

To the judge of the circuit court of the United States of America for the fifth judicial circuit:

Your petitioners, the City of Marshall and the County of Harrison, in the State of Texas, both of which are bodies politic duly incorporated under and by virtue of the laws of the State of Texas, show unto your honor—

That heretofore, to wit, on the first day of December, 1885, suit was instituted by the city of Marshall and on the 30th day of December, 1885, suit was instituted by the county of Harrison against the Texas & Pacific Railway Company in the district court of Harrison county, Texas, and that certified copies of the petitions, citations, returns, and judge's order in said suits are hereto annexed and are hereby referred to and made part hereof, which certified copies set forth fully and explicitly the cause of action of petitioners in said suits and the relief thereby sought.

Petitioners represent that the cause of action set up in said petition is that in or about the year 1872 the county of Harrison, in consideration of the agreement of the Texas and Pacific Railway Company, also a body politic duly incorporated to permanently locate its main machine shops, the Texas office, and eastern terminus of its road at the city of Marshall, in Harrison county, Texas, donated to said railway company, in negotiable coupon bonds, the sum of three hundred thousand dollars; and that said city
49 of Marshall, about said time also, in consideration of a contract by said railway company entirely similar in terms to that of the county of Harrison as set forth above, donated to said railway company sixty-six acres of land of the value of sixty thousand dollars or more; that said company received both said bonds and lands and appropriated them to its own use and complied with its said contract up to about the year 1881, after which time said company began surreptitiously and has so continued up to the present time to remove parts of its Texas office, machinery, and shops from said city of Marshall in violation of said contract.

Your petitioners show that the Honorable J. G. Hazlewood, judge of the fourth judicial district in and for the State of Texas, on the 27th day of November, 1885, granted a preliminary injunction in the case of The City of Marshall *vs.* the said railway company restraining said company from removing from said city any more of its offices, machinery, and shops, which injunction was, on the first day of December, 1885, issued and served on said company.

That no preliminary injunction was asked for or granted in the case of Harrison county against said company for the reason that it was thought unnecessary, as an injunction had already been granted and served in the city suit. In both of said cases a manda-
50 tory injunction is sought against said railway company to compel it to comply with said contract and bring back to said city of Marshall the offices moved away in violation of said agreement.

Your petitioners show that the Honorable Don A. Pardee, circuit judge of the United States for the fifth judicial circuit, at the city of New Orleans, on the 16th day of December, 1885, in the circuit court for the eastern district of Louisiana, appointed John C. Brown and Lionel A. Sheldon receivers of said railway company and as such they were confirmed on the 9th day of January, 1886; said appointment being after the granting and service of the preliminary injunction hereinbefore referred to.

Your petitioners respectfully show that on, to wit, the 14th day of January, 1886, a citation in each of said suits hereinbefore mentioned was served on John C. Brown, making him, as receiver of the Texas and Pacific Railway Company, a party defendant to said suits.

That on, to wit, the 23rd day of January, A. D. 1886, the plaintiffs in each of said causes hereinbefore mentioned dismissed in vacation each of said causes as to the said John C. Brown and Lionel A. Sheldon, as receivers of the said Texas and Pacific Railway Company, and paid all the costs in each of said causes that had accrued in and about the procurement of service on the said receivers, but
51 one of whom had been served; that no answers of any kind has [have] been filed by the said receivers or either one of them.

Petitioners attach hereto certified copies of the papers filed by them discontinuing said suits as to the said receivers and copies of the orders entered by the clerk of the district court of Harrison county on the minutes of said court, dismissing each of said causes, which they pray to be considered as a part of this application.

Petitioners represent that on the night of, to wit, the 18th of January, 1886, the office of the superintendant of said Texas and Pacific Railway Company, together with all the books, papers, furniture, and belongings of every kind and character, was secretly, about the middle of the night of the day last aforesaid, placed in cars and transferred to the city of Dallas, in the State of Texas, in plain violation of the contract of said railway company with said city and county, as set forth in their said petitions hereto attached.

The defendant in said suits has entered its appearance in each of said causes, by petition and bond, for the removal of the same to the circuit court of the United States, at Jefferson, Texas, copies of which are hereto attached and prayed to be considered as a part of this application.

Petitioners concede the right of the said defendant to have said causes transferred to and tried in the circuit court of the United
52 States, and interpose no objection to its removal.

Petitioners represent that prior to the appointment of said receivers the writ of injunction had been served in the case of the city on said company, which will appear by reference to a certified copy of said writ hereto attached.

The premises considered, the petitioners pray that the preliminary injunction granted by the Honorable J. G. Hazlewood, as hereinbefore referred to, be continued in force against said company and said receivers until said case is heard in the district court of Harrison county, Texas, at the next term thereof, to be held on the 15th

day of February, 1886, or in the circuit court of the United States of America for the eastern district of Texas, at Jefferson, as your honor may direct.

Petitioners further pray that your honor grant them permission to make said receivers parties defendant to said suits and prosecute said suits as aforesaid against said receivers and said company until final termination thereof.

And petitioners further pray that if your honor deem it necessary that said receivers be notified of this application that your honor fix the time and place of hearing the same.

WM. STEDMAN,
F. B. SEXTON,
JAMES TURNER,
JOHN T. PIERCE,
BOOTY & YOUNG,
For Plaintiffs.

53 STATE OF TEXAS, }
County of Harrison. }

Before me, L. H. Norwood, United States commissioner for the eastern district of Texas, residing at Marshall, Texas, on this day personally appeared H. B. Pitts, mayor of the city of Marshall, and W. T. S. Keller, county judge of Harrison county, Texas, and, being by me duly sworn, say that the allegations in the foregoing application are true.

H. B. PITTS,
Mayor City of Marshall, Texas.
W. H. KELLER,
County Judge of Harrison County.

Sworn to and subscribed before me this 25th day of January, A. D. 1886.

L. H. NORWOOD,
United States Commissioner for the Eastern District of Texas.

United States Circuit Court, Fifth Judicial Circuit.

Order.

AT CHAMBERS, NEW ORLEANS, *Jan.* 28, 1886.

This petition and accompanying documents, marked Exhibits "A & B," will be filed by the clerk of the United States circuit court at Jefferson, Texas, and a copy of said petition, without the exhibits, will be issued and served upon John C. Brown and Lionel A. Sheldon, receivers of the Texas & Pacific railway property, who are hereby directed to enter an appearance in and defend the
54 suits of The City of Marshall *vs.* The Texas & Pacific Railway Co. upon the filing of the transcripts thereof in the said U. S. circuit court at Jefferson; and it is ordered that upon the filing of said removal transcripts the injunctions issued in the said suits

in the district court of Harrison county, Texas, shall stand and be respected as the orders of the United States circuit court for the eastern district of Texas, and accordingly that thereafter the receivers of the Texas & Pacific Railway Company will maintain the present status as to the offices and shops of the said Texas & Pacific railway property at Marshall, Texas, until the directions of the said circuit court are given in the premises; and in the meantime said receivers will make no change in the premises unless authorized thereto by the U. S. circuit court for the eastern district of Louisiana, which court appointed said receivers, and to which they are responsible.

DON A. PARDEE,
Circuit Judge.
W. E. SINGLETON, *Clerk.*

Filed January 30th, 1886.

Defendants' Demurrer.

In the Circuit Court of the United States for the Eastern District of Texas, at Jefferson.

THE CITY OF MARSHALL, Complainant,
vs.
THE TEXAS & PACIFIC RAILWAY; JOHN C. Brown & Lionel A. Sheldon, as its Receivers; J. Gould, H. M. Hoxie, and Wm. Kerrigan, Defendants.
No. —. In Ch'c'y.

55 The defendants above named now come, by their solicitors, and say the matters and things set forth in complainant's bill of complaint, as the same are therein alleged, are not sufficient in law or equity to entitle complainant to the relief sought in said bill of complaint nor to require these defendants or any of them to make answer thereto or to any part thereof; wherefore they jointly and severally demur thereto, and pray the judgment of this honorable court whether they or either of them shall be required to make answer to the same.

F. H. PRENDERGAST,
Sol. for Defendants.

I certify that, in my opinion, the above demurrer is well founded in point of law.

JAS. A. BAKER,
Of Counsel.

I, John C. Brown, one of the defendants in above-entitled suit, do swear that the above demurrer is not interposed for delay.

JOHN C. BROWN.

Submitted and sworn to before me, a notary public in and for Dallas county, Texas, the 9th day of April, 1886; to certify which I

here sign my name and affix my notarial seal the day and
[SEAL.] year last above written.

W. SPENCE,
Notary Public, Dallas Co., Texas.

Filed April 12th, 1886.

W. E. SINGLETON, *Clerk.*

56 *Defendants' Answer.*

In the Circuit Court of the United States for the Eastern District of Texas, at Jefferson.

THE CITY OF MARSHALL, Complainant,
vs.
THE TEXAS & PACIFIC RAILWAY; JOHN C. Brown & Lionel A. Sheldon, as its Receivers; J. Gould, H. M. Hoxie, and Wm. Kerrigan, Defendants.
} No. 18. In Chancery.

The defendants, The Texas & Pacific Railway Company; John C. Brown & Lionel A. Sheldon, as receivers of said railway; J. Gould, H. M. Hoxie, and Wm. Kerrigan, saving and reserving all manner and benefit of exception that may or can be had or taken to the many errors and insufficiencies in complainant's bill of complaint contained, for answer thereto or to such parts thereof as they are advised it is material or necessary for them to answer, answering, jointly and severally, say:

I. They admit the corporate existance and capacity of the complainant and of the defendant, The Texas & Pacific Railway Company, as complainant alleges.

II. They admit that in June, 1872, the citizens of Harrison county, in pursuance of law, did vote to donate to this defendant $300,000 in the bonds of said county, bearing interest and payable as complainant alleges, on condition that this defendant would "establish its eastern terminus and Texas office at the city of Marshall, and locate and construct at said city its main machine shops and car works;" and defendant avers that it complied in all respects with said conditions; and afterwards, in April, 1874,
57 the county court of said county, before ordering said bonds to be issued and delivered, adjudged that the conditions by its said order of June, 1872, on which said bonds were intended to issue, had then been fully complied with by this defendant, The Texas & Pacific Railway Company, and then and there ordered said bonds to be issued and delivered to said railway company; but said defendant avers that said Harrison county failed and refused to pay the interest on said bonds, and in June, 1880, proposed to compromise with the holders of them by issuing new bonds to the amount of fifty per cent. (50%) of the bonds then outstanding and fifty per cent. (50%) of such of the accrued interest on them as was not barred by limitation. Upon information to the effect

that the holders of the bonds originally issued would accept such proposition and new bonds to be issued in pursuance of it, said county held an election on the 15th day of June, 1880, under the laws of the State and voted on said compromise proposition, and by a vote of the citizens accepted it; and in September, 1880, said compromise was ratified and made the judgment of the county court, and new bonds were then issued and delivered to the holders of the old ones, bearing six per cent. interest, and were accepted by the holders in lieu of the ones first issued, and the latter surrendered to the extent they could then and since be found.

This defendant denies that there is anything in the conditions on which it received the county's bonds originally issued which obliges it to make the city of Marshall its eastern terminus in that
58 sense that it cannot under any circumstances change it if its general business or the interest of the public demand it, or that there is anything in such conditions that obliges it to maintain at that city its machine shops or its main machine shops and car works if at any time thereafter its interest or that of the public shall demand a removal of them to another place. It says that other towns were equally anxious to be a terminal point and to have defendant's shops located with them in the hope that after being once established the interest of defendant and that of the public would continue the location as first established, and it submits that such is the fair and reasonable construction to be placed on said conditions as to the bonds; and to show that such was the understanding of this defendant at the time its board of directors, on the 9th of July, 1873, adopted the following resolution:

"Resolved, That the general offices of the company for the State of Texas, including the office of the land department and emigration bureau, be located, until otherwise ordered, at Marshall, and that a proper working organization of the several departments under the charge of the general superintendent, land commissioner, and emigration agent shall be under the immediate supervision and direction of the vice-president of the company."

III. They further admit that on the 30th day of September and the 1st of December, 1873, the city of Marshal donated
59 by deed of conveyance to the Texas & Pacific Railway Company the sixty-six acres of land mentioned in complainant's bill, and that said donation was made for the purpose and on the condition expressed in the deed of conveyance, and defendants annex hereto copies of said deeds of conveyance, which will show all the conditions on which said conveyances were made, marked as Exhibits A & B, as part hereof. They also admit that said railway company received said deeds of conveyance and took possession of the land conveyed and erected its main machine shops, round-house, etc., thereon, as by complainant is alleged, and which are of great value, and which are now and have always been used for the purposes intended, as far as said railway can or is permitted to do with the aid of a writ of assistance from this honorable court; and said railway company complied in all respects with all the conditions contained in said deeds of conveyance.

IV. It admits that Jay Gould was elected president of the Texas & Pacific Railway Company on or about the time alleged by complainant, but denies that he ever had possession or management of said railroad and its business otherwise or in any other way than as its president in the general management of its business in like manner as the business of railroads generally is managed.

V. Defendants deny that the general Texas office of defendants was not in Marshall before and at the filing of complainant's
60 bill. Some departments were removed, but the principal Texas office and officer remained at Marshall until the filing of the bill and until the company's general superintendent went out of office and the receivers appointed their own general superintendent.

VI. They further say that shortly before or about the time said Gould was elected president of said railway company the Missouri Pacific Railway Company acquired a majority of the capital stock of the St. Louis, Iron Mountain & Southern railway, extending from Texarkana to St. Louis, and likewise acquired the right to run and operate the International & Great Northern railroad, which connects with the said Texas & Pacific railway at Longview and extends to Houston, Texas, and there connects with the Galveston, Houston & Henderson railway, which extends from Houston to Galveston; and shortly afterwards said The Missouri Pacific Railway Co. acquired the right to run and operate said Galveston, Houston & Henderson railway. The Texas & Pacific railway extended from Longview to Texarkana, where it connects with said St. Louis, Iron Mountain & Southern railway, thus making, by means of these four roads, a continuous line from Galveston, Texas, to St. Louis, in the State of Missouri, and the Texas & Pacific railway connected with all of them. It necessarily followed that the four lines named had a common interest in a large freight
61 and passenger business which of necessity must be done over two or more of said lines, and it was found that in many instances the same person could represent and attend to the business of all of them quite as well as to the business of any one of them, and competent men could be had to do so for about the same salaries as each of said roads had been paying for like service; so it was arranged between the Missouri Pacific and Texas & Pacific railways that they would employ the same men to do the business of both roads, as far as practicable, and each would pay its proportion of the salaries of the men so employed and in this way reduce the expenses of both roads.

Then for the greater convenience and facility for handling the business in which they had a common interest some of the employés of the Texas & Pacific who had before resided and done their business at Marshall were transferred to other points for the time being. Among them were the auditor, the general freight agent, and the general passenger agent; and about the dates named in complainant's bill and for the reasons hereinbefore affirmed the Missouri Pacific Railway Company and the Texas & Pacific Railway Company at their mutual expense employed the same auditor, the same

general freight agent, and the same general passenger agent; and it is true that the auditor resided and kept his office at St. Louis, and it is true that because more of the business originated at Galveston, that city being a terminal point and very much larger than
62 Marshall, the general freight agent and the general passenger agent of said two companies were transferred from Marshall to Galveston; but defendants say that the duties usually performed by the officials thus named do not nor did they constitute the Texas office of the Texas & Pacific railway mentioned in the alleged contract with complainant, but the same were in fact but departments of said office, and said officials were transferred only for the time being and for the purposes and reasons mentioned above.

They admit that the vice-president of the Texas & Pacific railway did remove to St. Louis, but they say said removal was temporary only; nor was his residence at Marshall a necessary part of the Texas office so long as he was able to perform his official duties at other points.

They say that the cashier and paymaster of the Texas & Pacific railway always remained at Marshall and transacted his business there and along the line of said road until he resigned, in 1884, and from thence on the principal pay-rolls of said company were kept and made out at Marshall, as before, and the moneys were paid out there and along the line of said road afterwards in like manner as before his resignation.

Defendants deny that the general stock and claim agent's office was removed from Marshall to Dallas, as alleged. It is true that he was transferred to Dallas for a short time for the transaction
63 of some business in his department, but was soon returned to Marshall, where he has ever since resided and transacted his business until the road was placed in the hands of receivers, as alleged by complainant.

VII. They deny that the general master mechanic and superintendent of machinery was ever removed from Marshall, as alleged. It is true that the division superintendent of the New Orleans Pacific railway was removed from Marshall to New Orleans, as complainants allege-, but the office of the superintendent of the Eastern Division was kept at Marshall and was never removed therefrom, except for a short time temporary to Longview Junction; and they aver that the offices of the New Orleans Pacific railway were not contemplated in the alleged contract.

VIII. They admit that the land department of the Texas & Pacific railway has been removed from Marshall to Dallas, as complainants allege-, but the only reason for this was that most of the land- of said company are located west of Dallas, and, Dallas being one of the most, if not in fact the most, central point- in the State for meeting persons desiring to purchase or rent lands, the business of that department can be transacted at Dallas much more conveniently and efficiently and much more to the interest of said railway company and its creditors having a lien on said lands.

IX. Defendants expressly deny that any change made in the place of transacting its business, as herein admitted, was made with

64 intent to injure or destroy the business and general prosperity of complainant by taking its employés from Marshall, or otherwise, as the complainants allege-. They deny that one thousand employés left Marshall in consequence of all the changes so made, which complainant calls removals. They admit that about eighty were taken away as a consequence, but deny that any number of persons not connected with said road left Marshall in consequence of said changes.

X. But defendants aver that in 1881 the Texas & Pacific Railway Company became the owner of the New Orleans Pacific railway, which connects with the Texas & Pacific railway between Marshall and Shreveport, and the Texas & Pacific railway established the western terminus of said New Orleans Pacific railway at Marshall, and from thence ever since has been running and operating it, and this increase of the demand for labor brought to Marshall to reside many more employés than left there on account of the changes made as aforesaid; whereupon they expressly deny all false and fraudulent representations charged to have been made by defendant Hoxie and others, as charged by complainant.

XI. These defendants aver that at the time complainant's bill was filed and for a long time next prior thereto there were more men employed in the shops of said railway at Marshall than there were in 1881 or any time prior thereto; and defendants deny that the population of the city of Marshall was ever greater at any
65 time than at the time complainant filed its bill in this case.

XII. These defendants say it is not true that any machinery purchased for and belonging to the shops at Marshall has at any time been removed therefrom, as charged in complainant's bill. They say that while the Rio Grande Division of said railway was being built, say from Fort Worth to El Paso, some machinery was necessary, especially for that division, and was purchased with proceeds of sale of bonds on that division, and this was placed in the shops at Marshall temporarily, until the company could prepare for the use of it on said division, and then it was removed from Marshall, and so with the New Orleans Pacific, but this constitutes all of the machinery that has ever been removed from the shops at Marshall since they were established.

XIII. These defendants say it is not true, as alleged by complainant, that said railway company sent more of its rolling stock to St. Louis for repairs or other work to be done on it, and as a consequence reduced its force in its shops in Marshall; but, on the contrary, they say the average number of shop employés was constantly increasing and has been since 1881.

XIV. Defendants admit that said railway company erected a building at Marshall and used it for a time as a general office, and that since then it has been appropriated to the purpose of a hospital for the sick and wounded employés of said railway company,
66 which they say is a necessary and humane duty; but they deny that as a hospital it is becoming a common nuisance to the city of Marshall, or that the offices now at Marshall are occupying buildings only temporarily.

XV. These defendants admit there is at Marshall all the offices alleged in complainant's bill to be there, but they deny that said railway company or these defendants or any of them is or are about to remove them or any of them, except the superintendent's office, or has threatened to do so; and deny also that said railway company or these defendants or any of them is or are about to remove its shops or machinery from Marshall or have threatened to do so.

XVI. These defendants deny that any office or machinery or men have been removed from Marshall by defendant Gould or any one else with malicious intent to injure the plaintiff, and they also deny that any such removals were made in pursuance of any settled purpose, conspiracy, or combination to ruin or injure the plaintiff's business, population, commercial trade and property, as alleged in complainant's bill.

XVII. They also deny that the necessity for any changes complained of arose from any unlawful acts of these defendants or any one or more of them.

XVIII. They also deny that there was formed, as complainant alleges, any unlawful combination of railroads in Texas whereby the Texas and Pacific railway was combined with other
67 competing lines under one management, known as the Gould system of railroads, or that the necessity for any changes of which the plaintiff complains arose from any unlawful intent or act on the part of these defendants or any one or more of them.

XIX. Defendants expressly deny that complainant has sustained any damage from any of the alleged acts of these defendants or any of them, as charged in its petition; but if it has, the same can be estimated and recovered in an action at law, and these defendants are abundantly able to respond to any judgment which complainant may obtain on account thereof.

XX. Defendant- further denies [deny] all charges of fraud and fraudulent confederation and conspiracy.

XXI. They admit that on the 16th day of December, 1885, by order of this honorable court, said Texas & Pacific railway and its appurtenances, shops, and all its other properties were placed in the possession of defendants Brown & Sheldon, as receivers, at the suit of its creditors, as complainant alleges, and they are now in possession and in the management of said properties under the order of this honorable court, and they submit whether said properties while in their hands as receivers ought to be charged or made liable for any damages claimed by complainant in this suit, and whether as to them the injunction heretofore granted in this cause should be allowed longer to stand as to them and their action under the court's order.

XXII. And now, having fully answered all the matters and
68 things in complainant's bill of complaint alleged, as far as they are advised it is necessary or material to answer, if there is any other matter or thing therein which is not herein sufficiently answered, denied, or confessed and avoided the same is admitted to be true.

F. H. PRENDERGAST,
Solicitor for Defendants.

THE STATE OF TEXAS, }
County of Dallas. }

On this day personally appeared before me, the undersigned authority, W. H. Abrams and, being by me first duly sworn, upon his oath says that he is the assistant secretary of the Texas and Pacific Railway Company; that he has read carefully the foregoing answer, and the matters therein stated are true so far as they are stated on his own knowledge, and so far as they are stated on information and belief he believes them to be true.

W. H. ABRAMS,
[SEAL.] *Assistant Secretary the Texas & Pacific R'y Co.*

Sworn to and subscribed before me this 10th day of April, A. D. 1886.

W. SPENCE,
Notary Public, of Dallas Co., Texas.

Filed April 12th, 1886.

W. E. SINGLETON, *Clerk.*

EXHIBIT A.

THE STATE OF TEXAS, }
County of Harrison. }

Know all men by these presents that whereas an agreement was made and entered into on the 22nd day of June, 1872, by and between the City of Marshall and the Texas & Pacific Railway Company, by which the City of Marshall agreed to donate to said company sixty-six acres of land at the place and in the shape designated on the map of the city of Marshall by Col. Thos. A. Scott, president of said company, whereon to locate the main machine shops, car works, and depot of said company at said city, and the said Texas & Pacific Railway Company agreed to establish its eastern terminus and Texas office at the city of Marshall, and also to establish and construct at said city the main machine shops and car works of said railway company; and

69

Whereas the city of Marshall having acquired from the previous owner thereof the title to the tract of land hereinafter set forth and described, the same being a part of the sixty-six acres desired by and donated to the said Texas & Pacific railway for the purposes herein set forth; and

Whereas the city of Marshall having, by a resolution passed by the mayor and common council of said city on the 30th day of September, 1872, directed a deed of conveyance of said land from said city to said Texas & Pacific Railway Company to be made and executed:

Now, therefore, in consideration of the premises above recited, as well as in consideration of the sum of one dollar paid to the said City of Marshall by the said Texas & Pacific Railway Company, the receipt whereof is hereby acknowledged, the said City of Marshall does hereby give, grant, bargain, sell, alien, convey, confirm, and

deliver unto the said Texas & Pacific Railway Company the following-described tracts and parcels of land, to wit, situated in Harrison county, in the State of Texas, and bounded as follows: Lots numbered one and three (1 & 3) in block No. (46) forty-six, both
70 in the railroad addition in the city of Marshall; also the following-described tract of land, containg sixty acres of land, more or less, bounded as follows:

Beginning at a point on the north side of the railroad track and fifty (50) feet from middle of same, near west end of first curve west of railroad depot, a stake from which a forked red oak be- S. 3° E., distance 25 feet, marked X; thence N. 13½ E. 185 feet to projected middle line of said road tract; thence, in same direction, 650 feet to stake in S. D. Rainey's field; thence S. 76½ E. 79 feet to west boundary of lands of the Harrison County Agricultural and Mechanical Association, Rainey's east line, 1,362 feet to James Turner's west line, 2,400 feet to Jefferson road, 3,251 feet to Port Caddo road, 4,800 ft. to stake in Hynson's field, 35 feet west of his eastern fence; thence S. 13½ W. 325 feet to a stake north of the centre line of railroad track at a point on the right line between a large sweet-gum on the south side of said track; thence westwardly parallel to the center line of said track and fifty feet therefrom, excepting in block- 51 and 52, where said westwardly line is one hundred feet from said centre line of said railroad track, to the place of beginning—

Excepting from the sixty-six-acre tract hereinabove described twenty-one sixty-six one hundredths (21.66) acres, which now belong to the heirs of Mrs. Hynson's estate, described as follows:
71 Commencing at a point in the Port Caddo road where it is crossed by the north boundary line of the tract hereinabove described, thence S. 76½ E. 1,549 feet to a stake in Hynson's field 35 feet west of his eastern fence, the N. E. cor. of the tract hereinabove described; thence S. 13½ W. 325 feet to a stake 50 feet north of the centre line of the railroad track; thence westwardly, parallel with the centre line of said railroad track and fifty feet therefrom, to the east boundary line of Mrs. Craig's tract; thence north to a stake on the eastern boundary line extended to James Turner's 13-acre tract; thence along said east boundary of Turner's tract to the Port Caddo road; thence along the line of said road, in the centre thereof, to the place of begining, containing, as above stated, twenty-one and sixty-six one hundredths (21.66) *of an* acre-, more or less.

And further excepting from the said sixty-six-acre tract hereinabove described a small tract belonging to the heirs of Dr. Eames, lying on the north side of the railroad track immediately east of the twenty-two one hundredths ($\frac{22}{100}$) acre tract conveyed by Joseph Mason to the city Marshall and west of the eighty-three one hundredths acre tract conveyed by Lee Sanders and wife and F. A. Richardson to the city of Marshall, and between the land of the railroad reservation on the south and the lands conveyed by S. D. Rainey and the Harrison County Agricultural & Mechanical Association to the city of Marshall on the north, containing fifty-eight
72 one hundredths ($\frac{58}{100}$) of an acre, more or less, together with all and singular the rights, members, hereditaments, and ap-

purtenances to the same belonging or in anywise incident or appertaining;

To have and to hold the said land above described to the only proper use and benefit of the said Texas & Pacific Railway Company, in accordance with the agreement hereinbefore recited, and to enable said company to locate thereon its principal machine shops, car works, as hereinbefore specified; and this said City of Marshall does hereby warrant and defend the right and title to the land aforesaid to the said Texas & Pacific Railway Company against the claims of any and all persons whomsoever claiming or to claim the same or any part thereof.

In testimony whereof the mayor of the city of Marshall has hereunto signed his name and caused the same to be signed by the recorder of said city and the seal of said city to be affixed hereto. Done at the city of Marshall on this 30th day of September, A. D. 1872.

[SEAL.] J. K. WILLIAMS,
Mayor of the City of Marshall.

C. W. SLATER, *Recorder.*

Signed, sealed, and delivered in presence of—
L. M. FISHER.
W. L. SLOAN.

EXHIBIT B.

THE STATE OF TEXAS, }
County of Harrison. }

Know all men by these presents that whereas an agreement was made and entered into on the 22nd day of June, 1872, by and between the City of Marshall and the Texas & Pacific
73 Railway Company, by which the City of Marshall agreed to donate to said company sixty-six acres of land at the place and in the shape designated on the map of the city of Marshall by Col. Thos. A. Scott, president of said company, whereon to locate the main machine shops, car works, and depot of said company at said city, and the said Texas & Pacific Railway Company agreed to establish its eastern terminus and Texas office at the city of Marshall, and also to establish and construct at said city the main machine shops and car works of said railway company; and

Whereas the City of Marshall having acquired from the previous owner thereof the title to the tract of land hereinafter set forth and described, the same being a part of the sixty-six acres desired by and donated to the said Texas & Pacific Railway for the purposes herein set forth; and

Whereas the City of Marshall, having, by a resolution passed by the mayor and common council of said city on the 30th day of September, 1872, directed a deed of conveyance of said land from said city to said Texas & Pacific Railway Company to be made and executed:

Now, therefore, in consideration of the premises above recited, as

well as in consideration of the sum of one dollar paid to the said City of Marshall by the said Texas & Pacific Railway Company, the receipt whereof is hereby acknowledged, the said City of Marshall does hereby give, grant, bargain, sell, alien, convey, confirm,
74 and deliver unto the said Texas & Pacific Railway Company the following-described tract or parcel of land, to wit:

The same tract conveyed by Chas. E. Hynson, as guardian of Chas. W. Hynson, Stella Bell Hynson, and Cornelia C. Hynson, and by J. Ringold Hynson, S. F. Dean, and W. H. Dean, by their attorney-in-fact, Chas. E. Hynson, to said city of Marshall, by deed dated the 18th day of February, A. D. 1873, and recorded in the record of deeds for Harrison county in Book No. 1, pages 466, 467, and 468, and bounded as follows, to wit: Commencing at the southern corner of the 7½-acre tract bought by the city of Marshall from Mrs. Craig and stake 50 feet north from the centre line of the railroad track, thence north with the eastern boundary of same 25 feet to its intersection with the southeast boundary line of James Turner's 12-acre tract at its southeast corner; thence along said southeast boundary N. 29½ E. 392 feet to intersection of the same with the north boundary line of the 66-acre tract agreed to be donated to the Texas & Pacific Railway Company by the city of Marshall; thence along said north boundary S. 76½ E. 1,642 feet to a stake 35 feet west of eastern fence on said 100-acre tract; thence S. 13½ west 326 feet to a stake 50 feet north from another in center of railroad track in right line between a large red oak on the north side and a large sweet-gum on the south side of the same; thence westerly, in the line parallel to said road track with its curves and tan-
75 gents and 50 feet from the center of same, to the place of beginning, containing 22.38 acres, more or less, being situated in Harrison county, Texas, and being part of a tract of 100 acres of land partitioned among Chas. W. Hynson and Stella Bell Hynson, Cornelius C. Hynson, J. Ringgold Hynson, and Sophia F. Dean by the district court of Harrison county at the October term thereof, A. D. 1872, together with all and singular the rights, members, hereditaments, and appurtenances to the same belonging or in anywise incident or appertaining; to have and to hold the said land above described to the only proper use and benefit of the said Texas & Pacific Railway Company in accordance with the agreement hereinbefore recited, and to enable said company to locate thereon its principal machine shops and car works, as hereinbefore recited and specified; and the said City of Marshall does hereby warrant and defend the right and title to the lands aforesaid to the said Texas & Pacific Railway Company against the claims of any and all persons whomsoever claiming or to claim the same or any part thereof.

In testimony whereof the mayor of the city of Marshall has hereunto signed his name and caused the same to be signed by the recorder of said city and the seal of said city to be affixed hereto.

76 Done at the city of Marshall on this the 1st day of December, 1873.

J. M. HALL,
Mayor of the City of Marshall.

[SEAL.]

J. H. COLEMAN,
Recorder of the City of Marshall.

Filed 14th day of April, A. D. 1886.

W. E. SINGLETON, *Clerk.*

Complainant's Joinder in Demurrer.

CITY OF MARSHALL
vs.
TEXAS & PACIFIC R'LW'Y CO. & BROWN & SHELDON, Receivers.

The plaintiff now comes, on this the 1st Monday in May, 1886, it being May rule day, and joins issue on the defendants' demurrer to plaintiff's bill and sets the same down for hearing on the 1st day of the next — of this court, on the 2nd Monday in September, A. D. 1886.

YOUNG & BOOTY &
JAMES TURNER,
Complainant's Solicitors.

Filed April 14th, 1886.

W. E. SINGLETON, *Clerk.*

Recorded May 3rd, 1886, page 53.

Complainant's Replication.

Circuit Court of the United States for the Eastern District of Texas, Holding Sessions at Jefferson.

THE CITY OF MARSHALL
vs.
THE TEXAS & PACIFIC R'LWAY; JOHN C. BROWN & LIONEL A. SHELDON, Receivers, and Others.

The replication of The City of Marshall, in Harrison county, complainant, to the answer of The Texas and Pacific Railway
77*a* Company; John C. Brown and Lionel A. Sheldon, receivers; J. Gould, William Kerrigan, and H. M. Hoxie, defendants.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver, maintain, and prove their said bill of complaint to be true, certain,

sufficient in law to be answered unto, and that the said answer of said defendants is untrue, except the allegation as to the compromise of said bonds with the holders of the same and such other facts as are alleged in said bill of complainant and admitted in said answer, uncertain, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatsoever in said answer contained material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

JAMES TURNER,
BOOTY & YOUNG,
Complainant's Solicitors.

Filed May 3rd, 1886.

W. E. SINGLETON, *Clk,*
By R. HERZ, *Dep'y.*

Recorded Rule Book 1, page 53, 54.

77*b* *Agreement for Hearing.*

U. S. Circuit Court, at Jefferson.

OCT. 5TH, 1886.

THE CITY OF MARSHALL,
vs.
THE TEXAS & PACIFIC R'LWAY CO. *et al.* } Ch. No. 18.

It is agreed in this case that the above numbered and styled case be, and same is hereby, set down for hearing on the bill, demurrer, answer, and evidence at this the September term, 1886, and to be heard on Oct. 5th, 1886.

October 5th, 1886.

JAMES TURNER,
BOOTY & YOUNG,
For Complainant.

F. H. PRENDERGAST,
Counsel for Defendant's.

Filed Oct. 5th, 1886.

W. E. SINGLETON, *Clerk.*

Recorded in Minute Book 1, page 386, Oct. 5th, '86.
W. E. SINGLETON, *Clk.*

Decree of U. S. Court.

THURSDAY, *Oct.* 7, '86.

THE CITY OF MARSHALL,
vs.
THE TEXAS AND PACIFIC R'LWAY CO. *et al.* } Ch., 18.

On this the 7th day of October, A. D. 1886, this cause coming further on to be heard, and the said cause having been submitted on the general demurrer of defendants and on the complainant's bill and supplemental bill and the answer and replication and the evidence, and the court, having heard the argument of counsel, doth order as follows:

1st. The court dismisses the said cause as to Jay Gould, H. M. Hoxie, Wm. Kerrigan, and John C. Brown, in so far as the said John C. Brown is sought to be affected personally, at the cost of the complainant, The City of Marshall.

2nd. The court finds that a contract existed between the said complainant and the defendant, The Texas & Pacific Railway Company, by which, in consideration of the donation from Harrison
78*a* county, Texas, in the sum of three hundred thousand dollars in the bonds of said county and sixty-six acres of land donated by said complainant to said defendant railway company, the said railway company agreed to permanently establish its eastern terminus and Texas office at the city of Marshall, and to also establish and construct at said city of Marshall the main machine shops and car works of said railway company.

3rd. The court finds that the contract was duly executed upon both sides, and that the eastern terminus of said railway company and the Texas office of said company and the main machine shops and car works of said railway company are and were established at the city of Marshall anterior to the commencement of this suit.

4th. It is therefore ordered, adjudged, and decreed by the court that said complainant, The City of Marshall, have the right to have the said contract kept, observed, and obeyed by the said defendant railway company, its officers, agents, servants, and employees.

5th. It is further ordered, adjudged, and decreed that the defendant, The Texas & Pacific Railway Company, and its receivers, John C. Brown and Lionel A. Sheldon, and each of them and each and all of their officers, servants, agents, and employees be restrained, enjoined, and inhibited from removing the eastern terminus of said railway company, the Texas office of said railway company, the main machine shops and car works of said railway company, or any or either of the said office, main machine shops, or car works from the said city of Marshall, Texas, and that the said receivers, John C. Brown and Lionel A. Sheldon, and each of them and the said railway company and each and every of their employees refrain from any and all act or acts in avoidance of said contract or
78*b* this decree.

6th. That this injunction be made perpetual, and that writs

of injunction be served upon each of said receivers and the said railway company for the enforcement of this decree.

7th. It is further ordered that the said complainant recover of the defendant, the said Texas & Pacific Railway Company, all the costs in this behalf incurred, and against the said Brown and the said Sheldon, as receivers of said railway company, all the costs in this behalf incurred since the said receivers were made defendants, save and except the costs hereinbefore charged against the plaintiff.

8th. It is further ordered and adjudged and decreed that the judgment for costs herein rendered be duly certified and, together with a copy of this decree, be served upon the receivers, John C. Brown and Lionel A. Sheldon, who are directed to call the same to the attention of the circuit court of the United States for the eastern district of Louisiana, by which they were appointed.

9th. It is further ordered that the clerk of this court do issue a certified copy of this decree and cause the same to be delivered to the clerk of the county court of Harrison county, Texas, to be recorded in the office of said county clerk.

Jefferson, Texas, October 7th, 1886.

CHAUNCY B. SABIN,
U. S. Dist. Judge for the Eastern Dist. of Texas.

79*a* *Testimony Taken Before Jno. B. Carter.*

THE CITY OF MARSHALL *vs.* THE TEXAS & PACIFIC RAILWAY COMPANY, J. Gould, H. M. Hoxie, William Kerrigan, and John C. Brown and Lionel A. Sheldon, as Receivers of the Texas and Pacific Railway Company.	Pending in U. S. Circuit Court at Jefferson, Tex.

MARSHALL, HARRISON COUNTY, TEXAS,
June 1st, A. D. 1886.

Be it known that, by virtue of the authority vested in me as special examiner, as per agreement hereto attached, marked "A," in the case of The City of Marshall *vs.* The Texas and Pacific Railway Company, J. Gould, H. M. Hoxie, William Kerrigan, and
79*b* *and* John C. Brown and Lionel A. Sheldon, as receivers of said railroad company, pending in the United States circuit court for the eastern district of Texas, at Jefferson, and being number 18 on the chancery docket, and in pursuance of the notice hereto attached and marked Exhibit B, I, Jno. B. Carter, as such examiner, did, on this the 1st day of June, 1886, at 9 o'clock a. m., in the main court-room in the court-house, in the city of Marshall, Harrison county, Texas, and both parties having appeared, by their solicitors, caused Herman Kritz, witness on the part of the complainant, the identical witness named in said notice, to come before me, who, after being duly sworn according to law to answer truthfully such questions as may be propounded to him by either of the parties in said case, the said witness, HERMAN KRITZ, answering, says:

What is your name, age, present occupation, and residence?

My name is Herman Kritz; forty-nine years old next fall; employed in the United States Treasury Department; reside at Marshall, Tex.

Were you acquainted with Col. Thos. A. Scott? Is he dead or alive?

I was. He is dead.

Were you acquainted with E. A. Blanch, M. D. Ector, and F. B. Sexton?

I was acquainted with them.

80 Have any of these died?

All dead but Col. F. B. Sexton.

When did Col. Thos. A. Scott die?

About three or four years ago.

When did Maj. E. A. Blanch and M. D. Ector die?

Blanch died in 1877; Ector died in fall of 1879.

I never saw Col. Thos. A. Scott write, but I have seen many business communications from him which required his signature. He was president of the Texas & Pacific Railway Co. from 1872 to 1881, inclusive. I was paymaster of the Texas & Pacific Railway Company, and was afterward cashier and principal financial officer in the Southwest; came here officially in August, 1873, and continued with the company in the capacities above named until September, 1881, when my position was changed to cashier and paymaster of the Texas & Pacific railway and the International & Great Northern Railway Company, and I held that position until 1884. After September, 1881, no more money was remitted me as cashier at Marshall from either agents or foreign railway companies, and no more vouchers paid by me for material purchased; stock killed. I have seen Thos. A. Scott's signature on a good many official communications and on many passes. The signature to letter dated July 16th, 1872, is the genuine signature of Thos. A. Scott, and I

81 here request the same to be attached to my deposition (and same is hereto attached, marked Exhibit "C"). I know the signatures of E. A. Blanch and F. B. Sexton, and the signatures signed to the paper June 26th, 1872, are the true and genuine signatures of E. A. Blanch and F. B. Sexton, and I here ask that said instrument be attached to my deposition, marked "D." William A. Wallace, vice-president of the Texas & Pacific Railway Company, instructed me to tell the people of Harrison county, Texas, that the agreement between them would be carried out in good faith, and for me to use all honorable means to get the bonds issued.

Defendants' solicitor objected to this testimony because the county of Harrison is not a party to the suit and the conversations were *inter alia acta.*

They built offices, large offices. As the road increased in mileage they increased the offices by adding more rooms, more vaults, and larger ones. The building used as office then was the one recently used as a hospital. The vice-president, Bond, constructed a house for his residence and lived there several years; then Brown, one of the

vice-presidents, occupied it. The general superintendent's residence was here built in 1872 and occupied by the general superintendent in 1874. Brown afterwards sold his residence to the company.

82 The above offices were located and maintained at Marshall, Texas.

The principal shops of the road were located at Marshall, Texas, in 1873. The principal offices and all principal officers necessary for the operation of the road, consisting of vice-president, general superintendent, auditor, general freight and passenger agents, local treasurer of cashier's office, general land office of Texas & Pacific road, chief engineer, vice-president'- office, remained in Marshall until after the consolidation of the Texas & Pacific with Mo. Pacific railway—that is, the management of the Texas & Pacific, International & Great Northern railway, Missouri Pacific, & Iron Mountain were consolidated, which took place in 1881, and the vice-president's and auditor's office were moved to St. Louis, Mo., in 1881; general manager's office moved to St. Louis in 1881; accounts of the cashier's office moved to St. Louis same time; auditor's office went there too same time; the freight and passenger office was moved to Dallas some time in 1882; general land office was moved in September, A. D. 1883, to Dallas, Texas; cashier & paymaster's office was moved to St. Louis in 1884; the superintendent's office, claim & damage agent's office, telegraph department, & superintendent of bridges and buildings were here in December, 1885.

The superintendent's office was removed from here since the
83 institution of the suit, at night. I was there at six o'clock p. m. on one day and found everything there in ship-shape and the clerks there, and came back there the next morning and everything was gone. I found one of the clerks there and he said he knew nothing of it. The removal of all of these offices were [was] done in a very unbusiness-like manner—that is, on very short notice. I got notice at 9 a. m. and left that night for St. Louis with all my papers and money. The land office had more time. It was not known outside that any of them were to be removed. It was the understanding of all the officers of the road that the general offices and shops were to remain here permanently. Extensive and expensive buildings were erected here for the shops, and they were increased from time to time to meet the requirements of the road. There was about seventy clerks in all the offices in Marshall, and we disbursed to the officers and clerks from eight to ten thousand dollars per month, and all other payments of all other claims were made here. The amount disbursed here for labor, material, damage claims, and such things, amounted to from 175 to 200 thousand dollars per month. From the time the offices and shops were located here to the time the offices were moved off the population of the town had increased nearly sixty per cent., and judging from general appearances, there has not been any increase in population since then.

The business of the town during the same time, to wit, from
84 the time the offices and shops were located here, increased about sixty per cent., and has been on the decline since the offices were moved off. In this connection I will state that I com-

municated what Wallace told me to Williams, chief justice of the county, in regard to the carrying out of the agreement between the county and the railroad. All the offices enumerated heretofore were understood by the company to be a part of the Texas office. Some of the subsidy bonds issued by Harrison county to the Texas & Pacific Railway Company were paid to contractors for work done for the California Construction Company; a lot of the new bonds issued in lieu of the old ones I sent to the proper officer in New York in 1881.

Cross-examined by F. H. Prendergast, solicitor for defendants, the witness says: The duties performed by me before the consolidation have been performed since the consolidation by D. S. H. Smith, as local treasurer. I lived here prior to the bringing of this suit and I do not know of any vacant houses for rent at that time, but have heard since that time that there are plenty of vacant houses to rent. The difference between the number of the employees in the general office prior to the consolidation and what are employed in them now is about seventy (70). The communicatian I made to Williams with relation to the contracts between the
85 county and the railroad company had no relation to any contract with the city; the city had already complied with her contract.

H. KRETZ.

JOHN B. CARTER, *Examiner.*

United States Circuit Court for Eastern District of Texas, Holding Sessions at Jefferson, Texas. In Chancery. May 15th 1886.

THE CITY OF MARSHALL
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY; JAY GOULD, H. M. Hoxie, William Kerrigan, Lionel A. Sheldon, and John C. Brown, Receivers of said Railway. } Ch. No. 18.

Please take notice that following-named witnesses, William M. Johnston, R. C. Garrett, W. W. Heartstill, F. B. Sexton, Esq., Jas. Turner, Esq., Daniel Dopplemayer, Herman Kretz, William T. F. Scott, Senior, and T. A. Elgin and C. D. Kretz, all of whom reside in the city of Marshall, in Harrison county, Texas, will be examined on the part of complainant, orally, before John B. Carter, examiner in the above cause, in the court-room, in the city of Marshall, said county and State, on the first day of June, 1886, at 9 o'clock a. m., at which time and place you will appear and put interrogatories to said witnesses, or otherwise participate in said examination if you shall think fit.

Done by order of said examiner May 15th, 1886,

JAMES TURNER AND
BOOTY & YOUNG,
For Complainant.

86 To F. H. Prendergast, solicitor for defendants.

U. S. Circuit Court for the Eastern District of Texas, Holding Sessions at Jefferson, Texas.

CITY OF MARSHALL
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY; JAY Gould, H. M. Hoxie, William Kerrigan, Lionel A. Sheldon, and John C. Brown, Receivers. } Ch. No. 18.

We, the undersigned attorneys, hereby agree that the testimony of all of the witnesses in the above case who reside in Harrison county may be taken orally before John B. Carter, of Marshall, as examiner, and that testimony of witnesses residing elsewhere may be taken by interrogatories and cross-interrogatories, either under the chancery practice of U. S. courts or under the statutes of Texas, provided either party may examine any witness- who reside elsewhere before said Carter, in Marshall, if they should happen to be in Marshall, or either party may bring his witnesses residing elsewhere before said Carter, in Marshall, for examination.

T. P. YOUNG,
JAS. TURNER,
A. J. BOOTY, *For Plaintiff.*
F. H. PRENDERGAST,
Sol. for Defendant.

Agreed to.
F. H. PRENDERGAST,
Sol. for Defendant.

87 MARSHALL, TEXAS, *June 26th*, 1872.

Col. Thos. A. Scott, pres't of the Texas and Pacific Railway Company, Philadelphia, Penn.

SIR: Pursuant to your request we now present to you, to be laid before the board of directors for the Texas & Pacific Railway Company, a written statement of the agreement made at Mrs. King's Hotel, in this city, on the 22nd inst., between yourself, on behalf of said railway company, and the undersigned, on behalf of the city of Marshall.

The county of Harrison (of which the city of Marshall is the county-seat) has determined, in the manner required by an act of the Legislature of the State of Texas passed April 12th, 1871, to donate to said Texas and Pacific Railway Company three hundred thousand dollars in the bonds of said county, payable in gold coin, having thirty years to run and bearing seven per centum interest per annum, and to levy a tax in the manner required by said act to provide for the payment of the principal and interest of said bonds, upon the condition that said company shall establish its eastern terminus and Texas office at the city of Marshall and shall locate and construct at said city its main machine shops and car works, thereby securing at said city the connections with said terminus pro-
88 vided for by the act incorporating said Texas and Pacific Railway Company and an act supplemental thereto.

We understand that a full transcript of the orders and decrees of the county court of Harrison county in regard to this matter has been furnished you.

In addition to this the city of Marshall will donate to said company sixty-six acres of land at the place and in the shape designated by you on the map of said city whereon to locate the main machine shops, car works, and depot of said company at said city.

The city of Marshall will procure said land by issuing its bonds in accordance with the provisions of the act of the Legislature of Texas already referred to, which bonds will be used in the purchase of said land.

The citizens of Marshall have already undertaken to cash said bonds to an extent sufficient to purchase all of said land which cannot be procured by donation directly by [from] the owners thereof.

The details of acquiring the title to said land for your company will be attended to by the city and were explained in our conversation with you.

In consideration of the donation of the said sum of three hundred thousand dollars and said sixty-six acres of land the said Texas and Pacific Railway Company will permanently establish its
89 eastern terminus and Texas office at the city of Marshall, and will also establish and construct at said city the main machine shops and car works of said railway company.

Awaiting your reply, we are respectfully your ob't servants,

F. B. SEXTON,
E. A. BLANCH,
M. D. ECTOR,
Committee on Part of City of Marshall.

TEXAS & PACIFIC RAILWAY COMPANY,
OFFICE OF THE PRESIDENT,
PHILADELPHIA, *July 16th*, 1872.

F. B. Sexton, E. A. Blanch, M. D. Ector, committee in behalf of the city of Marshall, Texas.

GENTLEMEN: I am in receipt of your favor of June 26th, setting forth arrangement between your committee and myself as president of the Texas and Pacific Railway Company.

The statement as you make it is satisfactory and I will have the matter ratified at the first meeting of our board of directors.

But the absence of Judge Pierrepont and Mr. Stebbins in Europe for a few weeks to look after our financial matters may prevent me from getting a quorum or [of] our directors together, but in due time it shall all be arranged.

Very respectfully, THOS. A. SCOTT, *President.*

90 By agreement of parties the examination of witnesses is hereby continued over to Thursday, June 3rd, 1886, at 9 o'clock a. m.

THURSDAY, *June 3rd*, 1886.

Examination of witnesses resumed:

Thereupon came WILLIAM M. JOHNSTON, a witness for complainant & the identical witness name- in the notice hereto attached, who, being sworn according to law, testifies as follows, to wit:

My name is William M. Johnston. I am merchandising; have lived in Marshall since January, 1853, and my age is fifty-six years. In 1873 I was engaged in merchandising in Marshall, Texas. In 1872, my recollection is that a vote was taken on the question whether the county of Harrison should donote to the Texas & Pacific Railway Company $300,000.00 in bonds to get them to locate said company's principal office and shops at Marshall, and the election was declared carried for the donation.

Thos. A. Scott and Col. Jno. W. Forney came to Marshall, Texas, shortly after the said vote was taken. Scott was president of the Texas & Pacific R. R. Co. and Forney was one of the directors of said company. While they were here they, Scott & Forney, had a meeting with the people at night, at the court-house, in Marshall. Forney made a speech, and my recollection is that Scott was present when the speech began. In the speech Forney expressed
91 their satisfaction at the vote having been taken, and that the donation had been determined to be given by Harrison county to the Texas & Pacific Railway Company, and in consideration for the same the company would build us shops here, in which they would employ at all times not less than five hundred workmen, and might be at times 1,000 workmen; that the general office of the Texas and Pacific would be established here, and would employ about two hundred men in said offices. He spoke also of the terminus of the road being made here and the branches of the road, for which the donation was given, and he spoke at length of the great benefits that the location of offices & shops & making this the termini of the road here would confer upon Harrison county and the city of Marshall. I think that Col. Thos. A. Scott did not speak, claiming that he was greatly fatigued, and put Col. Forney up to speak in his stead and for him. Up to this time I had not heard anything about the city of Marshall donating any land to the company for depot purposes, shops, &c., but heard of it the very next morning. The company demanded of the city of Marshall that it should donate to the company, in addition to the donation by Harrison county, sixty-six acres of land being a strip of land on the north side of the road six hundred feet wide and including some of S. D. Rainey's property on the west, and running to and including some of the Hynson property on the east, and also one
92 block of land on the south side of the road, where the freight depot and the general offices were afterwards constructed. Almost immediately the people of the city of Marshall got up a petition to the city council, as required by law, to take a vote by the citizens of Marshall on the question of voting $30,000.00 *dollars* of the city bonds for the purpose of purchasing the property above described. The city council ordered an election and the vote was

taken, and was carried in favor thereof by a large majority. The people of the city of Marshall by these acts declared that they resolved to acceed- to the company's demand for the sixty-six acres of land. I understood that the land was specified by Col. Thos. A. Scott that the company demanded of the city, and the company claimed that they wanted this land for the purposes of building thereon their depots, shops, and general offices. The demand was determined to be complied with as soon as possible under the law controlling elections for this purpose. Soon after the vote was taken the city council of Marshall appointed W. M. Johnston, W. W. Heartsill, and R. C. Garrett a committee, whose duty it was to purchase the land hereinbefore described, taking deeds therefor to the city of Marshall. The bonds voted to be issued were issued and placed in the hands of said committee, and the committee proceeded to purchase and did purchase all of said land from the owners thereof and took deed to the same to the city of Marshall.

93 Said committee had to pay for said lands about the sum of thirty-eight thousand dollars in the city's obligations, and in addition to this amount some of the parties owning the lands donated a portion of the same to the city. Before we had purchased any of the land a grading force of the company located on some of the same. Before we had purchased any of the land Col. Eddy or Gen'l Dodge, one or the other, addressed a note to the city council, stating that they were ready to commence operations and wanted the city to hurry up and get the title to the land. The committee finally acquired all the land demanded by the railroad company. After the city acquired the property the city made deeds to the property conveying the same to the Texas & Pacific Railway Company, and copies of the deeds are attached to the defendants' answer in this case, marked Exhibit- "A & B," which are here referred to and made part hereof. A Mr. Montgomery, who represented himself as agent of the company, called on me while I was chairman of the committee above referred to and asked me for the deeds from the individuals to the city of Marshall, and said he wanted them for the purpose of having the same recorded. I gave them to him and he had them recorded in the county records of deeds, and required the city to pay the cost of recording the same, which was done by the city. Since the time when the property was deeded to the railway company the Texas and Pacific Railroad Company have had the exclusive use and control and possession of the same.

94 They erected upon the blocks south of the road a large two-story building—frame building—and used it continuously up to the summer of 1881 as the general office of the company. North of the railroad they erected a very large brick building, which has been used since its completion as a machine shop continuously to the present time; they erected also thereon two large round-houses and a blacksmith shop and two turn-tables and two water-tanks, and master mechanics' offices, train despatcher's office, and also several miles of side tracking. Soon after the office was completed, the auditor's office, general superintendent's, general freight office, land office, cashier and paymaster's office, general stock and claim agent's

office, the office of general master mechanic & superintendent of machinery, and, after the New Orleans Division was completed, the superintendent of New Orleans Division, vice-president's office, and general storekeeper were located here until the summer of 1881, when the most of them were moved off. From 1872 to 1881 the population of Marshall increased at least sixty per cent., in my opinion. Since 1881 I think that the population has increased very little. From 1872 to 1881 the property—real estate—in Marshall increased in value about thirty per cent., and since 1881 the valuation of real estate has diminished generally.

95 From 1872 to 1881 there was a general increase in the prosperity of the town, and since 1881 there has been a decline in the general prosperity of the town. Since 1881 there has been a decrease in the rents of property; since 1881 there has been decrease in my business, and I do not know anything about it with others. I attribute the decrease above spoken of partly to the removal of the railroad offices from this place. I remember the removal of the auditor's office in 1881, and about that time I had a conversation with Col. H. M. Hoxie, general manager of the road, about the removal of the offices. I think that E. J. Fry was present, but not certain about that, and I was with a committee of citizens, and we waited on him about the removal of the division and offices, and as we thought that — was some probability about removing the shops H. M. Hoxie stated to us that it was a necessity under the new organization for them to take away the offices that had been taken away, and in consideration of having moved the offices away from Marshall that he proposed to increase the capacity of the shops located here, and that he would do so; that he would give us two laboring men in place of each man he had taken away; and, further, that each man that he would give us would be equal to two of the men that he had taken away from Marshall; that the men he would bring here as laborers would be men of families; that they would either rent houses or build houses here for their occupancy; that the men he had taken away were many

96 of them single men, transient and not likely to become permanent citizens; that the railroad company would want to make some investment here and might want to use some of the committee of which I was a member to assist them; all of which the company never did do. This statement by Mr. Hoxie had the effect to allay all excitement of the people over the removal of the offices, and had a good effect generally as long as we believed that they would do as Mr. Hoxie said they would. They changed the end of the division to Longview when Mr. Hoxie took charge of the road as general manager, in 1881, I think. This change took quite a number of the trainmen away from here, but I do not know how many. When Mr. Hoxie said in the interview I have given above "that it was necessary under the new organization for them to remove the offices to St. Louis," I understood from that that he referred to the consolidation of the Texas & Pacific Railroad Company with the Gould system. I understood and think that the whole community understood that the arrangement gone into be-

tween the people and the company was to be a permanent thing. I never heard any of the railroad officials say that this was to be temporary at all. I do not think that the people would have considered any proposition other than one they understood to be for the permanent location of the offices, shops, &c. The railroad company never made known to the people of Marshall at the time they received the bonds or previous to that time or since that time
97 that they were only locating here the offices, shops, &c., temporarily.

Cross-examined by F. H. PRENDERGAST, solicitor for the defendants:

Without consideration of the contract I would have taken the improvements the company placed here that I have spoken of, the machine shops, to have been intended to be permanent, but do not think I would have thought the same about the offices. The city would have derived some benefit from the shops, offices, &c., being placed here had they been placed here without any contract with the city and county with regard to the permanency thereof, and think that the benefit would have been about one-half of the amount of benefit we did receive, or thirty per cent. I stated in my direct examination that Mr. Hoxie's promise to increase the men in the shops was not complied with. I do not know that of my own personal knowledge, but obtained my information from shop men and other employees of the company and, I think, from some of the officers of the road. I do not not now recollect any particular one who told me so. Values in Marshall have depreciated also because of the general financial depression of the county. I know of three or four houses—dwellings—that have been built in the last year in Marshall; also as many as five business houses have been built since 1881. Some and most all of them were to replace old ones. The land the city donated to the company cost the city about
98 40,000 dollars, but had it been known that the offices, shops, &c., were not to be located here, but at some other place, this same property would have been worth at that time, in the condition it was then, about 4,000 dollars.

WM. M. JOHNSTON.

JNO. B. CARTER, *Examiner.*

And now comes JAMES TURNER, witness for the complainant, one of the identical witnesses named in the notice hereto attached, who, being duly sworn according to law, testified as follows, to wit:

My name is James Turner. I reside in Marshall, Texas, and — fifty years of age, and am an attorney-at-law; have resided in Marshall since November, A. D. 1857, and have been in the practice of law all the time. I know F. B. Sexton, who is now living in Colorado City, Texas; know E. A. Blanch and M. D. Ector, both of whom are now dead. I have seen each one of them write and know each of their signatures. The signatures marked Exhibit "D," attached to the answers of Kretz, are the true and genuine signatures of each of those

gentlemen. I also knew Thos. A. Scott in his lifetime; he is also now dead. He was president of the Texas & Pacific Railway Company in July, 1872, and president of the Southern Pacific Railway Company before that time. I have seen said Scott write once and perhaps twice, and am familiar with his signature, having seen it many times to letters and other documents. The signature
99 attached to the letter marked Exhibit "C," attached to Kretz deposition, is the genuine signature of Thos. A. Scott. In the year 1872, in the spring or early summer, a petition was prepared and submitted to the county court of Harrison county, Texas, asking the county court to submit to the people of Harrison county a vote on a proposition to donate 300,000 dollars in bonds, due in thirty years, conditioned that the Texas and Pacific Railway Company would permanently locate at Marshall its eastern terminus of the Texas & Pacific railway, together with its machine shops and Texas offices and car works, and secure to Marshall the connections provided for in the act incorporating the Texas & Pacific Railway Company. This petition was written by Wm. Steadman, one of the attorneys at that time of the Texas & Pacific Railway Company, to the best of my recollection, and was signed by over one hundred citizens of the county. This proposition was submitted to the people and carried by a large majority of the voters. The county court came to declare the result, and in that order, at the instance of the official of the railroad, they interpolated the word "thereby" in the order, making it read, "and thereby secure to Marshall the connections provided for by the act incorporating said road." A few days after this vote was taken and the result declared, probably a week afterwards, Col. Thos. A. Scott, president of the road, came to Marshall, accompanied by Gen'l G. M. Dodge, chief engineer; Jno. W. Forney, of Philadelphia, one of the directors; Mr. Walters, of Balti-
100 more, another one of the directors, and two or three others, whose names I do not now remember, were with them, came to Marshall on a tour of inspection and to see the property, and while at Marshall it was made known to him and his company that the subsidy had been voted in accordance with the proposition; and at a public meeting held at the court-house, at which Forney, Scott, and Walters were all present, in which Col. Scott expressed his satisfaction that the county had dealt so liberally with the company, but excused himself from making a speech, Col. Jno. W. Forney was the principal spokesman on the part of the railroad, and went on to state what the railroad proposed, on their part, to do; that they would erect shops here and locomotive works, and employing [employ] several hundred hands here—I do not remember the number he stated—and that the offices all being located here would also bring a great number of persons to reside at Marshall. I think I have a printed copy of his speech, which I will attach if I can find it.

The following day Col. Scott and his party and a party of citizens took a drive over the town, and when near the present freight depot Col. Scott remarked that he also understood that we were to give him grounds for depot, offices, and shop purposes, and claimed that

they would need a strip of land six hundred feet wide, measuring from the center line of the railway track north, and extend-
101 ing up and down the track about ¾ of one mile, he standing there and indicating the boundaries thereof with his walking cane; also one block on the south side, about 300 feet square, which he said he wanted for the purpose of erecting his office building thereon. This was a new demand on the people, as they had never promised to give him any ground for depot purposes other than that I had myself proposed to donate ten acres of land for depot purposes. Notwithstanding this demand the citizens of Marshall met together that day or the day following, and determined to stand the raise; and when Col. Scott returned through Marshall two or three days later they notified him that they would give him the lands he demanded.

A committee was appointed, a vote taken, bonds issued from the city of Marshall, and all the lands indicated acquired by the city and turned over to the railway company, the railroad taking possession of some of the property as early as August, 1872, and the balance in a few weeks thereafter. They erected on the block on the south of the railway a two-story frame office building, with full basement story below, with fire-proof iron vaults above and below. On the grounds north of the railway they erected a large brick building—two wings, two round-houses, blacksmith shop, brass foundry, two turn-tables, two or three water-tanks, a house for the master mechanic's offices, and office for the fireman of the round-house, and several miles of side-tracking, a dispatcher's office, and a large Y.

102 In the office building they afterwards located the general superintendents, auditor, treasurer, stock, & fuel agents, freight and passenger agent-, solicitors and vice-presidents, and all other departments of the road except the president and secretary's offices. They erected machinery in the building erected for that purpose, and maintained them in that attitude until the road passed under the control of the Mo. Pac. Railway Company, in 1881. They also erected at Marshall a dwelling-house for the superintendent, and the vice-president of the road purchased property and established himself here.

Ordered that this examination be, and the same is hereby, adjourned over till to-morrow morning at 9 o'clock.

FRIDAY, *June 4th*, 1886—9 a. m.

Examination of JAS. TURNER continued:

I do not remember the exact time that Jay Gould was elected president and took charge of the road, but think that it was in June or July, 1881, and the removals of offices all took place after that time; that after June, 1881, the auditor's office, general freight agent, general land office, general passenger office, cashier's and paymaster's office, treasurer's office, general master mechanic & superintendent of machinery office, vice-president's office were all removed from Marshall. In 1872 I do not think that the population

of Marshall exceeded 3,000, perhaps — so much; it had been,
103 however, more than that, but the road passing on to Longview took some of our population there. After 1872 this contract was made with the railway, and up to 1881 the population of Marshall increased, until in 1881 it was full 7,000, if not more. Since 1881 there has been a falling off in the population, and I do not think that the population now will exceed 6,000. On real estate, my impression is that the highest point real estate ever reached in Marshall was in 1868, when the road terminated here. After the road got to Longview property went down again, until this contract was made with the Texas & Pacific, in 1872, when property again went up and has remained at about the same general figure up to 1881. Since 1881 real estate has depreciated from 25 to 50 per cent., and even more than that in some instances. I do not want to be understood as saying that the removal of these offices was the sole cause of the depreciation in value, for I do not think that it was; it is due to a combination of causes, one of which is the general stagnation of business all over the country and the general depression and decrease in real estate values everywhere, as far as I am able to judge. The uncertainty of what was going to be done about the removal of offices, shops, &c., from Marshall was one of the most potent causes of the depreciation. The regular freight divisions were all moved from here to Longview after Mr. Hoxie took charge, in 1881.

There was from 1881 up to the appointment of the receivers a
104 large amount of work carried from here, north of here, to be done, I do not know where to, except what the superintendent told me. I have seen whole trains of damaged cars carried from here to other points to be repaired. Col. Cummings told me the reason of this was that this company did not have the means to have the work done here, and the Mo. Pacific Railway Co. was having the same done and advancing the money or crediting the Texas & Pacific Co. for the same. Since 1881 the general office has been used as follows: They kept in the said office building for a while the chief engineer's and superintendent of bridges and stock and claim agent's office, but finally all these were moved out of the building, and the building was used as a hospital after the hospital at Fort Worth was burnt. I believe, however, that the stock & claim agent occupied the building while it was used as a hospital. The general superintendent's office was kept in a building on the same block, built for a club house, until after this suit was filed.

That about the month of August or September, 1885, I was told either that the order has been issued to remove the superintendent's office to Dallas, Texas, or that the order would be issued as soon as an office building could be prepared. I do not remembor who it was who told me, but it was told me at the office and by some one attached to the office, and after the suit was brought and after
105 the receivers were appointed the office was moved. It was there late in the evening of one day and the next morning it was gone; do not know whether it was moved at night or in the morning, except from hearsay.

Mr. Littlefield, superintendent of telegraph, who also had his office

in the club-house building, told me that he expected that they would all be moved away. This was in August or September of 1885. I know nothing about the offices using temporary quarters except the superintendent of bridges office was occupying an old storehouse owned by L. Kahn as an office.

The Missouri Pacific in Texas crosses the Texas & Pacific Railway at Bells, in Fannin county, Texas, and at Mineola, in Wood county. From both of these points the Mo. Pac. has a line direct to St. Louis and other points north, and the Texas & Pacific also has a line to St. Louis and all points north, over its own line and over that of the St. Louis & Iron Mountain R'lway, and the two roads, in my judgment, are competing lines for St. Louis trade at both of said points and at Mineola, the Mo. Pacific control-ing. The I. & G. N. R. R. is also a competing line with the Texas & Pacific for Galveston trade. The Texas and Pacific, reaching Galveston by the way of Dallas, and the Texas Central R. R., and, before the Mo. Pacific combination, the Texas & Pacific, did compete at Mineola with the I. and G. N. R. R. at Dallas with the Central for Galveston trade.

106 I was here from the beginning of this contract with the company and the town and county, and was mixed up from the start in the contract, being intimate with the company people and with the town and company [county] people. The company urged upon the town and county to grant the subsidy far more strenuously than the people urged the company to locate their offices and shops here, although both parties were anxious about it. I never heard in any quarter or from any source any intimation that this was other than a permanent contract, and if it had been understood here that the company claimed it to be only temporary, or that it had the right to remove them at its pleasure, the proposition for a subsidy by either town or county would not have received fifty votes. The company never did maintain that the contract with the town and county was other than a permanent contract, and I never heard of any such claim until the defendant's answer was filed in this case. Upon the strength and faith of that contract there has been at least one million dollars invested in real estate improvements that never would have been invested here except for that contract or if they had have believed that the contract was temporary.

Cross-examined by F. H. Prendergast, solicitor for the defendants, the witness testified:

107 Wm. Stedman was the attorney for the Texas & Pacific Railway Company at the time the petition for an election on the bonus to the company. I heard Jno. C. Brown, vice-president of the Texas & Pacific railway, say that if the people of Marshall did not quit showing such animus against the railroad in trial of cases in the courts, that if they did not watch, the railroad company would bundle up and leave the place and move the shops. A large portion of the people of the county refused to pay the subsidy tax until the compromise of 1880. A good many refused to pay it because the railroad company had not secured to the city of

Marshall the connections as provided for in the act of incorporation and in the proposition on which the people voted to issue the bonds. There was no removals of any of the offices until after the people refused to pay the subsidy tax and voted a compromise of the bonds; however, the railroad prior to that time had disposed of nearly all the subsidy bonds, and only held enough to pay its own part of the subsidy tax. There have been from thirty to fifty new houses built here during the last two years.

JAMES TURNER.

JNO. B. CARTER, *Examiner.*

W. W. HEARTSILL, witness for complainant, being duly sworn, testified as follows:

My name is W. W. Heartsill; am 46 years of age; reside in Marshall, Texas, and have resided here 27 years. I am
108 vice-president of the Marshall, Paris and Northwestern Railroad Company. Immediately upon receipt of the news that a bill had passed Congress establishing the terminus of the Texas & Pacific at or near Marshall I had a poster printed and circulated the same, calling the people together to discuss the question as to the location of the shops, &c., here. A committee was appointed to correspond with the railroad officials in relation to the matter, and to report at a subsequent meeting; and at a subsequent meeting, as a consequence of this correspondence, a proposition was received from Col. Thos. A. Scott, president of the Texas & Pacific Railway Company, that if the county of Harrison would vote a subsidy of $300,000 *dollars* in bonds that the said railway company would permanently locate and establish their general office, machine shops, and eastern terminus of their road at Marshall, Texas, and would also, if in their power, locate the road, now known as the New Orleans Pacific Railroad, direct to Marshall, Texas; that immediately after this a petition was gotten up asking the county commissioners to order an election to vote the subsidy; which election was ordered, and held, and carried on that proposition by a very large majority. Within a few days Col. Scott, Col. Forney, and one or two others—I do not remember who—arrived in Marshall, and Col. Scott sprung a new ques-
109 tion on us by asking us where was the lands located or designated in Marshall for the shops, offices, &c., and at the same time stating that he wanted about 65 acres of land; that Col. Scott and his party, with Maj. Blanch and other members of a committee on the part of the citizens, went out on the north side of the town, and there located the land—that is, this land so designated was then occupied by a large number of people with their improvements. The night of the day that this transpired there was a mass meeting of the citizens of Marshall called to discuss this additional proposition, as there was considerable disappointment manifested by the people, they thinking that the 300,000 dollars in bonds was all that they had to pay; that Col. Scott — Col. Forney were present at the meeting. Several speeches were made by citizens urging the citizens of Marshall to purchase this land so designated; that Col. Forney ad-

dressed the citizens at the request of Col. Scott, in which he set forth the great advantages of railroads, and reinterating time and again all the above-mentioned propositions.

They decided at that meeting that they would buy the land, and appointed a committee, composed of W. W. Heartsill, Wm. M. Johnston, and R. C. Garrett, to purchase the land. The city voted a subsidy, and issued bonds with which to buy the land, and bought it at a cost to the city in city obligations of about 38,000 dollars. With this money we bought the property, and some of the land
110 being donated to us. Before we got the deeds all fixed up the company took possession of some of it and commenced grading, &c. This is the land upon which they have since built their shops and offices, &c., and have had possession of it ever since. Since this contract was entered into up to 1881 the population of Marshall has increased at least fifty per cent., and since the offices were removed, in 1881, the increase in population was about ten per cent.

From the time it was an established fact that the offices and shops would be located here up to the time they were removed real estate increased in valuation about 200 per cent.; since that time it has fallen off about 50 per cent. The business from 1872 to 1881 increased very rapidly. I was then renting stores for fifty dollars per month; since 1881 the business has decreased, and I can only get twenty-five dollars per month for the same business houses.

I attribute the increase of population, value in real estate, and increase in business to the location of the offices and shops here and the understanding that they were permanently located here, and the subsequent decrease of all of them to the removal and rumored removal of the shops and offices from Marshall.

I never heard of the proposition that this location of offices, shops, &c., was to be only temporary, and that they were only to be located here in the hope that the heavy expenditure of the company
111 in putting them up here would induce the company to keep them here, until I came into this room this morning, and if that had been the understanding I do not think that the proposition to give the company a bonus would have received a single vote.

Not less than one million dollars have been invested in real estate improvements on the faith and credit of the contract between the town and county with the railroad company.

Cross-examined by F. H. PRENDERGAST, solicitor for defendants:

Do not think any man would come here and expend money here without knowing of the contract and investing because of the contract; never heard of the contract being temporary until to-day; never heard it discussed as being a permanent contract. I do not think that there was much increase in population and general prosperity just because of the fact of the offices & shops being here without regard to the contract for them being permanently located here. There would, however, have been an increase of population if the company had just simply put them here without saying anything about the permanency; that had

they done that I think that the increase would have been about 20 per cent. The fear of other things being removed from Marshall effected values of property some. The people generally refused to pay the subsidy tax until the compromise, in 1880. If I had
112 have come here in 1880 and had seen the improvements placed by the company for offices and shops as they were then it would not have occur-ed to me to inquire whether they were permanent or not, and I would have taken them as being permanent.

W. W. HEARTSILL.

JNO. B. CARTER, *Examiner.*

R. C. GARRETT, witness for the complainant, being duly sworn, testified as follows, to wit:

My name is R. C. Garrett; am fifty-nine years old; reside in Marshall, Texas; my occupation is that of banker; have resided in Marshall since December, 1868. I was one of a committee to buy property for the city in 1872. Said committee was appointed at the instance of the citizens at a citizens' meeting; committee was composed of W. W. Heartsill, Wm. M. Johnston, and myself. We were appointed for the purpose of buying land, and we did buy the land. Col. Scott and his party were here, and looked over the town, and talked with the citizens about the shops and offices, and asked them where he was to put them, and marked out the ground he wanted in the sand with his stick. Maj. Blanch, on the part of the citizens, said that the city would furnish the land. I was not present, but that is what I understood was the way of it. The committee bought the land, and it was turned over to the company, and the company built the shops and offices on it; it was never intimated to us at
113 all that the contract to place the offices and shops here was only temporary, and had that been the case the vote would never have been made, and my understanding, after a conference with Col. Scott, was that the location was to be a permanent location. Mr. Forney said in a speech, on their return from Jefferson, and after we had notified them that we would give the ground, in which he told us that we could not expect them to make an Atlanta of Marshall, but spoke in glowing and graphic terms of the benefits to accrue to us by reason of the offices & shops being located here, far more than I expected that they would benefit us.

The location of the offices and shops here had the effect of increasing the population of the town, and up to the time of the removing of the offices everything seemed to have an upward tendency. In my part of town, previous to the location of offices and shops, there were very few dwellings, and as soon as the location was made it settled up very fast. From that time to the removal of the offices the population increased about fifty per cent., and in addition to that there was a large floating population. During the same period my property increased in value 400 or 500 per cent., and think that the increase in real estate was on an average two hundred per cent. During the same time general business increased very much.

Since 1881 the business has not been so good, and there
114 has not been the same demand for real estate that there was before, and it depreciated in value from seventy-five to one hundred per cent. I had a house that from 1872 to 1881 rented for $35.00 *dollars* per month. I have since 1881 rented for twenty dollars. There was a decrease in population after 1881, and we lost much of the floating population, such as those who had business with the road, who came here to headquarters to see the officials. I am satisfied that had it not been for the contract with the company and the location of the offices & shops here there would have been no investments here, because there were no inducements to invest until that was done; and I might say that all the investments that have been made were made because thereof.

Cross-examination of R. C. GARRETT by solicitor of the defendants:

A majority of the tax-paying people of Harrison county were in favor of voting the subsidy. My understanding was that the contract was to make Marshall a terminus and to give Marshall terminal rates—that is, that they would bring freight from St. Louis here cheaper than they would to Jefferson, by virtue of its being the terminus—and they, the company, never did give us the terminal rates, but discriminated against us in favor of other places, and that was one of the reasons that the subsidy tax was refused to be paid. The country people refused to pay the tax because, they said, that
115 the subsidy had been voted on them unjustly and by aid of the negro vote, and for various other reasons. If the company had put up the offices & shops here without any contract in the manner in which they did put them up the town would have grown, because most of people would have thought, from seeing them, that they were permanent because of the large outlay and expensive buildings they put up; do not think that people moving in here would have inquired what contract the city had with the company. Except the employees of the offices and the floating or transient men, I do not think that the population of the town has decreased any, but the removal of said offices prevented a large increase in the population, and, had they remained here, a great many good buildings would have been erected.

Probably — no more vacant houses in this town at the time of the institution of the suit than in other towns of the same size, but before the contract was broken the demand could not be filled. There have been from 25 to 50 houses built here in the last two years. The company did complain that there was prejudice against them here in Marshall, but I do not think there was any prejudice against them here. The complaint of the company was that they could not get justice in the courts here in the matter of suits, giving high and unjust verdicts against them.

116 My complaint against the road previous to the removal of the offices was that they did not give us terminal rates and secure to us the New Orleans connection, as agreed.

R. C. GARRETT.

JNO. B. CARTER, *Examiner.*

It is ordered that the examination of witnesses be adjourned till Monday, at 9 o'clock a. m., June 7th, 1886.

MONDAY, *June 7th*, 1886—9 a. m.

It is ordered that the examination of witnesses be, and the same is hereby, adjourned over till Tuesday a. m., June 8th, at 9 o'clock.

JUNE 8TH, 1886.

By agreement of parties the examination of witnesses adjourned over till June 18th, 1886.

JNO B. CARTER, *Examiner.*

JUNE 18TH, 1886.

T. A. ELGIN, witness for complainant, being duly sworn, testified as follows, to wit:

My name is T. A. Elgin; age, 46 years; resident of Marshall, Texas; came to Marshall in 1859; am in the cotton warehouse business. From 1872 to 1881 there was an increase in population of the city of Marshall of at least sixty per cent. Real estate values increased during the same time about one hundred per cent. Some
117 time previous to the contract with the company I bought the club-house lot near the freight depot with the houses thereon for two thousand dollars, and after the contract I sold the same for four thousand dollars without the houses, and that was the price settled on by arbitration by three citizens. Since the removal of the offices, in 1881, the population of Marshall decreased, but do not know how much. The value of real estate decreased, but did not decrease as much as it had increased. A very considerable amount of money has been invested here on the faith of the contract with the railroad company that would not have been invested here had it not been for said contract; cannot estimate how much. The building formerly occupied by the T. & P. railway as a general office has been used as a hospital under the Gould managment, and the objectionable feature thereof was that it was situated in a thickly settled portion of the city and it smelled of a great stench at night, and then the danger of bringing contagious deseases here. I think that they kept it about as clean as a hospital could be kept.

Cross-examined by F. H. PRENDERGAST, solicitor for defendants:

I can smell stenches in other parts of the city at night. If it had been known that the offices and shops were not to be located here the sixty-six acres of land that the city of Marshall deeded to
118 the railroad company was not very valuable, and I mean that it could have been bought for five or six thousand dollars. If the railroad had just simply built the shops and offices here without any contract it would have increased the value of property here, but then we would not have had the same amount of confidence in the permanency of the shops and offices. There being a contract made it better for any business man. I would not

have paid as much for property without the contract as I would have with it. I do not know that an ordinary prudent man would invest his money here without asking about what contract the city had with the company. I cannot tell. Some men might and some might not. The shops here appeared to be a permanent location, and if I had come here with my present experience I think that I should have investigated the permanency thereof. Property commenced decreasing when the divisions were moved off, and there was a decrease in the value of property and in population previous to the time that the committee waited on Mr. Hoxie, a short time after the divisions moved off. I do not know how many men moved off with the divisions or how many moved off in consequence thereof. This was the end of the run from New Orleans—that is, the passenger trains stopped here when coming from there, and were
119 made up here and run out of here to New Orleans. They laid over here from 11 o'clock till 4 o'clock.

Re-examined:

I never heard anything about the contract being temporary, but always understood that it was permanent. No one ever contended that it was temporary, and I do not now remember any man who was in the interest of the railroad company say that it was permanent or that it was temporary.

TOM A. ELGIN.

JNO. B. CARTER, *Examiner.*

D. DOPPELMAYER, witness for complainant, being duly sworn, testified as follows, to wit:

My name is Daniel Doppelmayer; age, fifty-two years; have resided in Marshall since 1849; am merchandising.

From 1872 and up to 1881 real estate increased in value very rapidly. To take the property all over town, I think that it increased in value sixty per cent. Population increased during same time very fast; could not build houses fast enough to supply the demand; I think it increased one hundred per cent. Since the removal of the offices there has been a decrease in real-estate value. There has not been the same demand for real estate since then that there was before. I think it has decreased at least twenty-five per cent. I think that there are as many people in the town now as
120 there was when the offices were moved off from here, but if they had remained I think there would have been a large increase. I think that one million dollars has been invested in real estate and in improvements on the faith of the contract to keep the shops and offices here. I never heard of the location being only temporary at all, and it has always been my understanding that the shops, offices, and headquarters should be located here permanently. I never heard it questioned. It was understood that in addition to locating the shops & offices here that the company would secure or endeavor to get the New Orleans railroad to this place.

Cross-examined by F. H. PRENDERGAST:

I do not know, of my own knowledge, of any vacant houses in Marshall. Dwellings and storehouses are being built here all the time; I know of several myself; but if things had remained as they were the increase in building would have been double what it is now.

D. DOPPELMAYER.

JNO. B. CARTER, *Examiner*.

It is ordered that the examination be, and the same is hereby, adjourned till Monday, 21st of June, A. D. 1886.

MONDAY, *June* 21st, 1886.

121 Col. F. B. SEXTON, witness for the complainant, being duly sworn, testified as follows, to wit:

My name is F. B. Sexton; am fifty-eight years of age; reside in Marshall, Texas; am an attorney-at-law; came to Marshall in 1872. I was, in connection with E. A. Blanch and M. D. Ector, both of whom are now dead, appointed as a committee in June, 1872, to confer with Col. Thos. A. Scott, president of the Texas & Pacific Railway Company, in regard to the location of the offices and shops of the said railroad company—that is, the general offices and main machine shops to be located at the city of Marshall. We met Col. Scott on, it must have been, the morning of the 21st day of June, 1872, at Mrs. King's Hotel, in the city of Marshall. After Col. Scott had been shown around the city and was on the ground where the shops and offices were proposed to be located, he pointed out to Maj. E. A. Blanch, with his umbrella, the general direction which he wished the lines of the land to run, and inquired of Maj. Blanch if he had a plot of the town with him. Major Blanch replied he did not, but would furnish him a plot when he returned to the hotel. In the afternoon of the same day Maj. Blanch did furnish Mr. Scott a plot of the town of Marshall, and Mr. Scott took his pencil and marked out the location and diagram on said plot of the ground he desired, giving the length of the lines. During the day I learned that there was a misunderstanding between Mr.

122 Scott and the people of Marshall as to what was to be given to the railway company by the city of Marshall, the people thinking that the three hundred thousand dollars in bonds that had been voted by the county was all that was required, while Mr. Scott declared that his understanding was that in addition to that the people were to furnish ground enough to erect the shops and offices upon. Some time during that day Mr. Scott was furnished with a copy of the orders and decrees of the county court of Harrison county, Texas, in relation to the bonds. The committee told him that they would endeavor to get the people to furnish the ground necessary that he desired, and report to him the next day on his return from Jefferson. During the day and night, as I now recollect, a meeting of the city council was held and a public meeting besides, in which the city council determined to issue bonds of the city in a

sufficient amount to buy the ground that was required, and the people of the town cashed the bonds. On Mr. Scott's return from Jefferson, on the 22nd of June, 1872, we reported these facts to Mr. Scott, at the King House, and told him that we were prepared to close the contract if he was. He said he was very much gratified to hear it, and said to us that the best way to close the contract was for us to address him a note in writing at the office of the company in Philadelphia, stating the contract as we understood it, and
123 that he would lay it before the board of directors and send us a reply to it. At the close of the conversation and just before we left I asked Mr. Scott, for the purpose of making a definite announcement to the people, who were then holding a meeting at the court-house, if this matter was settled and if I could say so to the people. He replied, in substance, "Certainly, sir; you may say that it is absolutely settled." On the 26th of June, 1872, the committee—Maj. Blanch, Col. Ector, and myself—made out a statement of the contract as we understood it, in the form of a note addressed to Mr. Scott, and the paper or note marked Exhibit "D" and attached to Herman Kretz's deposition is a duplicate original of said contract, to which we received Mr. Scott's reply, and said letter is the one that is marked Exhibit "C" and attached to Herman Kretz's deposition, and is the identical letter we received from him in reply to the same.

During all these negotiations it was understood by all the people by whom the subject was spoken of and all the conversations and acts of Col. Scott were on the line that the shops and offices were to be permanently located at Marshall, Texas.

When Col. Scott returned from Jefferson, and in course of conversation with him, he stated that the people of Jefferson had been very liberal with the road, and made some statements in detail as to what they had done, and said that in addition they wanted to talk shop to him; that he said to them in reply that he could
124 not say anything to them in regard to shops; that there was a contract pending with another place in regard to them, and that he did not think that the shops would get nearer than sixteen miles of them.

In the fall of 1872, in October, I think, I prepared a deed from the city of Marshall to the Texas and Pacific Railway Company for the sixty-six acres of land on which the shops and offices were afterwards erected, which deed was duly executed by the mayor of the city of Marshall and which was delivered by Wm. Johnston, in my presence, to J. M. Eddy, who was then the principal officer or manager of the railroad company, at his office, then on said sixty-six acres of ground. In the fall of the year of 1872 the company went actively to work, graded the land or ground, erected a large two-story building for their general offices, which was afterwards enlarged with the addition of basement story, fire-proof vaults, and an additional wing containing some twenty or thirty rooms. They also erected a large brick machine shop, two round-houses, and several other buildings I do not now recollect, and a large number of side tracks, and within my knowledge the general business and

headquarters of the company were located and kept at Marshall until the month of June, 1878, and, according to my understanding, they were continued here till 1881. Maj. Stedman and myself applied, at the instance of the railroad company and as
125 their attorneys, to the county court of Harrison county, about the March or April term of said court, 1874, for the issuance of the bonds provided for by the aforesaid contract. We alleged on behalf of the company that the company had fully complied with the contract, and we proved that the shops had a capacity to give employment to 2,500 men, and on this application the bonds were issued and received by the company—that is, Maj. Blanch told me that he took the bonds to Austin and had them regi-tered and sent them by express to Col. Scott.

Cross-examined by F. H. PRENDERGAST, solicitor for defendants:

I do not recollect that the connection of the New Orleans road was referred to in my negotiations with Thos. A. Scott. When we applied for the bonds on behalf of the company there was a protest filed thereto by N. V. Board *et al.*, and the court heard the evidence and decided to issue the bonds.

F. B. SEXTON.

JNO. B. CARTER, *Examiner.*

The examination of witnesses is now, by the consent of parties, adjourned over till July 19th, 1886, at 10 o'clock a. m.

JNO. B. CARTER, *Examiner.*

JULY 19TH, 1886.

Examination continued till July 21st, 1886.

JNO. B. CARTER, *Examiner.*

126 JULY 21ST, 1886—10 o'clock a. m.

W. N. KENNEDY, witness for complainant, being duly sworn, testifies as follows, to wit:

My name is W. N. Kennedy; present occupation, station agent for the receivers of the Texas and Pacific Railway Company at Marshall, Texas. I have been connected with that office nearly ten years. Here is a partial list of the machinery shipped from Marshall, Texas, to various points, as specified therein, and I ask that the same be marked Exhibit "E" and attached to my answers.

Cross-examined by F. H. PRENDERGAST, solicitor for defendants:

There has been some machinery brought here in the last three or four years; as many as three or four times, I think.

Re-examined by JAS. TURNER, att'y for complainant:

The machinery shipped from here was taken out of the shops here at Marshall, Texas.

W. N. KENNEDY.

JNO. B. CARTER, *Examiner.*

By agreement of parties the plaintiff's time of taking testimony was extended till July 22nd, 1886, and the time of the taking of defendants' testimony was extended till the 1st of September, 1886.

JNO. B. CARTER, *Examiner.*

127 I, Jno. B. Carter, examiner, hereby certify that the name of W. N. Kennedy, the witness above examined, was, by agreement of the parties, included in the notice to take testimony, and with said witness the plaintiff conclude their [its] evidence.

To certify which I hereto set my hand this the 21st day of July, 1886.

JNO. B. CARTER, *Examiner.*

Partial List of Shipment of Co. Stuff Billed from Marshall to Various Points.

Dec. 18, '82. 3 lathes, bill'd by Hamma, S. K., to W. H. Riely, Ft. W'th.

Feb'y 26, '86. 1 jig-saw, billed by Hamma, S. K., to H. H. Seisson, Palestine.

M'ch 5, '83. 1 bx. cir. saw, billed by Hamma, S. K., to W. H. Seisson, Palestine, # 2500.

" 6, '83. 1 machine & sex., billed by Hanna, S. K., to H. H. Seisson, Palestine, # 1000.

" 9, '83. 1 plainer, billed by Hanna, S. K., to W. H. Seisson, Palestine, # 10000.

Aug. 31, '83. 1 car machinery, billed by McFarlin, S. K., to J. G. Coulon, Palestine, # 20000.

Sept. 19, '83. 1 T. & P. div'd engine, # 35, & material, billed by Haynes, M. M., to J. Hewett Parsons, Kas.

Sept. 22, '83. 1 T. & P. engine, # 696, billed by McFarlin, S. K., to Parsons, Kas.

Oct. 8, '83. 1 T. & P. engine, # 560, billed by McFarlin, S. K., to Sedalia, Mo.

" 9, '83. 1 car lumber, # 20000, billed by McFarlin, S. K., to Palestine.

" 17, '83. 1 wrecked T. & P. engine, # 526, billed by McFarlin, S. K., to Parsons, Kas.

" " " 1 wrecked T. & P. engine, # 646, billed by McFarlin, S. K., to Parsons, Kas.

" " " 2 cars material for same, billed by McFarlin, S. K., to Parsons, Kas.

Dec. 1, '83. 1 T. & P. engine, # 512, billed by M. F., S. K., to Sedalia, Mo.

" 1, " 1 T. & P. engine, # 510, billed by M. F., S. K., to Sedalia, Mo.

Jan'y 23, '84. 1 car material, 30,880 lbs., billed by M. F. to J. Doyle, Denison.

Feb'y 29, '84. 3 cars, 20,000 each (plow cars), to Jno. Hodge, Sedalia, Mo.

Ap'l 24, '84. 1 pr. power shears, 3 boxes material, } 10,350 lbs., to storekeeper, Palestine.

128 The United States of America to the marshall or any of his deputies for the eastern district of Texas; to the sheriff or any constable of Harrison county, Texas:

You are hereby commanded that you summon W. H. Kennedy to be and appear before me at the office of James Turner, Esq., in the city of Marshall, State of Texas, and county of Harrison, at 10 o'clock a. m., on Monday, the 19th day of July, A. D. 1886, then and there to testify in behalf of the complainant in a certain suit now pending in the United States circuit court for the eastern district of Texas, at Jefferson, wherein The City of Marshall is complainant and The Texas & Pacific R. R. Co.; J. Gould, H. M. Hoxie, William Kerrigan, and John C. Brown and Lionel A. Sheldon, as receivers of said railroad company —, and that he so diligently and carefully search for, examine, inquire for, and bring with him and produce, at the time and place aforesaid, all the impression books of freight bills for bad cars and machinery shipped from Marshall since January 1st, 1883.

Herein fail not, but have you then and there before me this writ with your return thereon showing how you have executed the same.

Witness Jno. B. Carter, examiner of said court.

Given under my hand this the 17th day of July, A. D. 1886.

JNO. B. CARTER, *Examiner.*

129 Came to hand July 17th, 1886, at 3 o'clock p. m., and was executed on the 17th day of July, 1886, by reading the within *subpœna duces tecum* to W. N. Kennedy in person.

S. R. PERRY,
Sheriff of Harrison County, Texas,
By C. V. FRALEY, *Deputy.*

CITY OF MARSHALL

vs.

TEXAS & PACIFIC R'LWAY CO., J. GOULD, H. M. HOXIE, WILLIAM Kerrigan, John C. Brown, and Lionel A. Sheldon, as Receivers of said Company.

Pending in U. S. circuit court for eastern district of Texas.

Came on to be heard the evidence of the defendants, and the following-named witnesses, appearing, were sworn on behalf of the defendants, — stated as follows:

STEPHEN KELLY, being sworn, says: I am in the employ of the receivers of Texas & Pacific R'lway Co., at Marshall, and have been employed in said shops since May, 1881. (Witness, being shown the list of material shipped away from Marshall as shown by Kennedy's evidence, says:) The lathes, three of them, were sent from the shops at Marshall to Fort Worth. This was when the company were establishing the shops at Fort Worth. Two or three lathes and one plainer were put in Marshall shops in place of those taken to Fort Worth. I know nothing of the wood machinery in the list. Two of the en-

gines in the list were sent away in exchange for two other
130 engines, and the remainder of the engines were sent away for repairs. The reason they were not repaired here was that we could not repair them here soon enough, and sent them away because they were in a hurry for them. We did not have force enough at Marshall at that time; we were running a short force here then. The pair — power shears shown as shipped to Palestine April 24th, 1884, was not shipped out of the shops at Marshall. I am in charge of that department, and know no power shears have been shipped from there. Since September, 1881, the amount of machinery in the shops at Marshall has increased. There was sent from Marshall shops to the shops at Bonham one drill press, one lathe, and one planer. This was in 1882 or 1883. I know of no reason why sufficient force was not kept at Marshall.

STEPHEN KELLY.

JNO. B. CARTER, *Examiner.*

J. V. BEER, witness for def'ts, being sworn, testified as follows, to wit:

My name is J. V. Beer. I am in the employ of the receivers of the Texas & Pacific Railway Co. I have worked in the shops at Marshall since 1877; foreman of wood machinery has been my position, and I am still at work in the wood shop. Since September,
1881, there has been shipped from Marshall one car-load
131 of machinery; was shipped from here to Denison, but the car-load came from below here and was not taken out from the shops here. There was taken out of the shops two plainers, one mortising machine, one rip-saw, but they were replaced with better tools. The plainers were sent to Palestine; mortising machine and rip-saw were sent to Texarkana. They were sent off because we had no use for them here; had plenty of tools to do the work with, and did not interfere with the business at all. Quite a lot of machinery was brought to Marshall and unloaded and not put up and then reshipped to other points.

J. V. BEER.

JNO. B. CARTER, *Examiner.*

Suits on Bonds & Coupons in U. S. Court vs. City of Marshall.

In the Circuit Court of the United States for the Eastern District of Texas, Holding Sessions in said District.

Be it remembered that in the following causes judgments were rendered against Harrison county, in the State of Texas, and the several judgments paid by the officer of the county. The amounts and dates of judgments and date of payment thereof are as follows, to wit:

ALEXANDER DAVIS
vs.
HARRISON CO. } No. 44.

Petition filed Feb'y 2nd, 1880, for 49 coupons on Harrison county bonds, issued 11th day of April, 1874, to aid in the construc-
132 tion of railroads and other works of public improvements in aid of the Texas and Pacific Railway Co. The bonds are issued in sums of $100.00, $500, & $1,000.00, all payable to the Texas & Pacific Railway Co. or bearer, thirty years after the date thereof, in U. S. currency, and to bear 7 per cent. interest per annum, payable annually, at the office of the treasury [treasurer] of the State of Texas, the interest and two per cent. of principal being represented by the coupons hereto annexed.

Judgment rendered Oct. 16th, 1880, for $1,543.33 and mandamus sent, file- July 16th, 1881, and judgment rendered for perem-tory mandamus Oct. 14th, 1881, and judgment satisfied Nov. 7th, 1881.

B. K. JAMISON
vs.
HARRISON COUNTY. } No. 47.

Petition filed April 5th, 1880, for 194 coupons on bonds issued as in case No. 44, Alexander Davis *vs.* Harrison Co., which coupons amounted to the sum of $12,936.62, and judgment rendered on the 16th day of October, 1880, for the sum of $12,867.43, and judgment liquidated thereafter by payment by County Collector N. A. Searcy.

ALEXANDER DAVIS
vs.
HARRISON COUNTY. } No. 59.

Petition filed April 8th, 1881, and filed amend- petition April 15th, 1881, for eight coupons on bonds issued as in case No. 44, Alexander Davis *vs.* Harrison County, amounting to the sum
133 of $1,831.60 principal and $252.83 interest, making $2,084.43 principal and interest, and judgment rendered Oct. 17th, 1881, for said amount. Petition for writ of mandamus No. 90 filed Feb'y 13th, 1882, and judgment rendered; perem-tory mandamus — Feb'y 17th, 1882, and judgment paid W. S. Herndon, attorney, April 12th, 1882.

W. N. COLER, Jr.,
vs.
HARRISON COUNTY. } No. 65.

Petition filed July 9th, 1881; amended petition filed August 8th, 1881, for 93 coupons on bonds issued as in case No. 44, Alexander Davis *vs.* Harrison Co., which coupons amounted to $3,505.85. Judgment rendered October 17th, 1881, for $3,505.85.

Petition for writ of mandamus filed Feb'y 13th, 1882, and judgment rendered for perem-tory mandamus Feb'y 17th, 1882, and judgment paid by N. A. Searcy, collector of said county, April 10th, 1882.

J. H. McLEAN *vs.* HARRISON COUNTY. } No. 131.

Petition filed Sept. 11th, 1883; amended petition filed January 30th, 1884, for sixty-two coupons on bonds issued as in case No. 44, Alexander Davis *vs.* Harrison County, which coupons amounted to $1,320.88. Judgment rendered for said amount Feb'y 15th, 1884.

Petition for writ of mandamus filed July 2nd, 1885, and judgment rendered for perem-tory mandamus Sept. 18th, 1885, and judgment paid to W. S. Herndon Oct. 22nd, 1885, by the clerk of the U. S. circuit court.

134 W. N. COLER, Jr., *vs.* HARRISON COUNTY. } No. 194.

Petition filed April 20th, 1885; suit brought on twelve coupons on bonds issued by Harrison county as in case No. 44, Alexander Davis *vs.* Harrison County; which coupons amounted to $824.70. Judgment rendered 18th day of September, 1885, and judgment paid Feb'y 11th, 1886, to W. S. Herndon, att'y, by the clerk of this court.

I, W. E. Singleton, clerk of the U. S. circuit court in and for the eastern district of Texas, do hereby certify that the above and foregoing is a true and correct transcript in the causes above stated as found on the records of this circuit court.

Given under my hand and seal of the circuit court for the eastern district of Texas, at Jefferson, this the sixth day of October, 1886.

[SEAL.] W. E. SINGLETON,
U. S. Circuit Court Clerk, East. Dist. Tex., at Jefferson.

Filed October 6th, 1886.

W. E. SINGLETON, *Clerk.*

Statement of Employees at Marshall in Shops & Offices.

Statement showing the number of men at Marshall in shops, offices, etc., and total amount of pay-rolls for the month of August, 1881.

C. W. Hammond, sup't telegraph	4 men	$246 00	
J. W. Parks, stock ag't	2 "	225 00	
J. M. Bassett, res'd't engineer	3 "	450 00	
E. R. Murphy, auditor	32 "	2,489 00	
W.H. Newman, G. F. & P. A.	9 "	997 00	
135 H. Kretz, paymaster	3 "	383 00	
F. Ferris, sec'y to gen'l man'g'r	4 "	405 00	
W. Morcum, p'v'te sec'y v.-pres.	1 "	150 00	
W. H. Abrams, land dep't	11 "	1,259 00	
W. Reiley, watchmen, &c.	5 "	206 00	
T. J. Campbell, sol'r & att'y	5 "	1,224 00	
Shop rolls	385	18,298 00	
			$26,332 00

Statement showing number of men employed at Marshall in shops, offices, etc., and total amount of pay-rolls for the month of November, 1885.

Claim agent's office	4 men		$380 00
Trav. engineer's office	9 "		762 50
Store-room	8 "		424 35
Hospital, employees & physicians	22 "		426 00
Ass't M. M. & shipping cl'k	2 "		235 00
Tick't agent, bag., porters, etc.	9 "		402 60
Fr'ght agent, clerks, etc.	11 "		515 00
Coal-heavers	6 "		159 30
Clerks in B. & B. dep't, ass't eng., &c.	13 "		653 65
Yard-masters, switchmen, &c.	20 "		945 00
Carpenters, Marshall yard	13 "		565 00
Pumper, "	1 "		60 00
Div. sup't's office	2 "		135 00
Tel. dep't, gen'l foreman, operator, & linemen.	36 "		1,684 80
Shop employees	459 "		21,407 40
Total number of men	615		
Total am't pay-rolls			$28,755 60

136 *Transcript from County Court, Harrison County.*

County Court. Special Term, April 26th, 1872.

Be it remembered that the honorable county court of Harrison county met this day, April 26, 1872, in special session.

Present and presiding: J. P. Lynch, chief justice *pro tem.*, and J. A. Price and A. T. Justus, justices of said county, constituting a quorum and a court. Present also: W. H. Poland, sheriff, and C. E. Bolles, clerk.

In the County Court of Harrison County. Called Session, April 26th, 1872.

Be it remembered that on this day came on to be heard the petition of B. H. Martin and more than fifty freeholders of Harrison county, praying that the court do order a registration and election to be held to determine whether the county of Harrison will donate $300,000 in its bonds, running thirty years, bearing interest at the rate of seven per cent., gold, to the Texas & Pacific Railroad Company, said petition being in the words following, to wit:

To the honorable county court of the county of Harrison:

The undersigned, freeholders of said county, respectfully petition your honors to take the opinion of the electors of said county, on a petition to be submitted to said electors, whether the said county will donate to the Texas & Pacific railroad the sum of $300,000 in the bonds of said county, running thirty years, bearing interest at

the rate of seven per centum per annum, paid in gold, to aid in the construction of said road from the said city of Marshall to San Diego, on the Pacific coast; the said donation to be conditioned upon the fact that the eastern terminus of said railroad shall be permanently established at said city of Marshall, with such connections as [at] said terminus as are provided by the act incorporating said railroad company, with its Texas office and main shops, and to the end that said proposition may be submitted to said electors your petitioners pray your honors that the registration required by law be made and all acts and things be done which are necessary for the purpose.

B. H. Martin, W. L. Wheat, O. Hendrick, Geo. R. Hill, B. F. McCarty, Jr., W. P. Hudgins, Harry Rowson, John Hudson, Wm. Umbdenstock, J. H. Calloway, A. M. Barnham, G. P. Perry, Chas. McCowan, J. M. Hall, Wm. M. Brown, Geo. B. Adkins, N. A. Harvey, E. P. M. Johnson, Harry Schwartz, James H. Starr, James F. Starr, A. Kullmen, W. M. Jones, Isaac Schwartz, Felix Graudy, Felix Spierman, W. A. Salmon, Samuel Spierman, Dan. S. Hawley, D. S. Jennings, H. McKay, Wm. H. Dial, A. S. Justus, Joseph Lopez, A. Loeb, J. H. Bell, Jr., F. B. Scott, Lee Saunders, J. S. Clower, J. S. Wagnon, Edward Clark, Albert Taylor, E. P. Hancock, D. McPhail, B. F. Eads, Wilson McNair, John W. Fraley, Sam. G. Alexander, John H. Pope, Geo. N. King, W. H. Carter, Pres. Maulding, J. Dreifus, W. L. Sloan, Jos. Weisman, J. W. Goodspeed, W. T. Smith, G. M. Phillips, Geo. L. Hill, R. C. Garrett, L. Golden, T. D. Sampson, R. S. Allen, J. W. Granbury, R. Knight, E. A. Sadler, W. W. Heartsill, Jasper Hill, P. M. Moore, William Copeland, W. E. Miller, John F. Miller, F. Woltz, J. C. Harrison, Geo. Lane, H. J. Nichols, Thomas M. Bowers, W. H. Pope, T. S. Langley, J. H. Van Hook, M. M. McPhail, Clinton V. Fraley, John T. Greer, John T. Pierce, E. A. Blanche, B. M. Baldwin, T. A. Elgin, A. A. Smith, W. H. Poland, W. R. Pogue, D. H. Gaines, Geo. Murzbacher, Chas. Henrich, Green Hill, David Abner, Alexander Lane, Harry Hyde, Shack Roberts, Roberts Richard, Louis Richard, Wm. C. Pierce, O. H. Benvall, W. N. Kennedy, Silas Devereau, Thos. Payne, F. M. Stinson, Hardy M. Carr, G. B. Lipscomb, Peter Brown, Geo. Hammond, John R. Hall, Thomas P. Nelson, C. W. Slater, John Maise, F. B. Sexton, Edmund Brown, Henry Ford, Major Stubblefield, Patrick Dennis, Edmund Willis, T. A. Bell, Wm. G. Thomas, Wm. Stedman, James Turner, Austin Bates, Peter Braden, John Jackson. Lee Sanford, Thos. Harrison, Geo. Delaney, Jack Evans, Boston Dennis, Wm. H. Taylor, Geo. Speed, Alexander Bell, E. Schwartz, Wat. Richardson, Commodore Heard, John Gregg, S. H. Russell—141.

And it appearing to the court that the said Texas & Pacific Railway Company, in consideration of said donation, agrees to make its eastern terminus at the town of Marshall, and to locate its principal office for the State of Texas at said town, and to erect and establish at said town its machine shops, and to secure at said town the connections provided for in the act of Congress chartering said company, and it appearing to the court that

more than fifty of the aforesaid petitioners are freeholders in the said county of Harrison, it is therefore ordered by the county court that the prayer of said petitioners be granted, and that an election be held at the town of Marshall on the 3rd day of June, 1872, continuing three days—that is, the third, fourth, and fifth days of June, 1872—to determine whether the county of Harrison will donate the sum of $300,000 to the Texas & Pacific Railroad Company to secure the terminus of the said road at the town of Marshall, with its machine shops and principal Texas office, and to secure the different connections, branch offices, provided for by the aforesaid act of Congress to be made from the said town of Marshall; and it is ordered that the following-named persons are appointed managers to hold said election, to wit, Ed. Bussy, B. R. Bass, and H. L. Derry, who shall make returns thereof to the court on the first Saturday in June, 1872.

And it is further ordered that the vote at said election shall be by ballot, and in all things in accordance with provisions of an act of the Legislature of the State of Texas entitled "An act to authorize cities and towns to aid in the construction of railroads and other works of internal improvement," and in accordance with the provisions of an act entitled "An act to provide for a special
140 registration of voters preparatory to any election under the provisions of an act to authorize counties, cities, and towns to aid in the construction of said roads and other works of internal improvement," approved April 12th, 1871, and to declare who shall be considered qualified voters at any election held under the provisions of said act. Said last-mentioned act is approved May 31st, 1871.

And it is further ordered that due and legal notice be given of said election, in accordance with the law in such cases made and provided.

And it is further ordered that the registrar of Harrison county be ordered to proceed and make registration required by law, and that a copy of this order be served upon him, and that a special session of this court be held on Monday, June 10th, 1872, to examine the report of the managers of said election.

I certify that the above is a true and correct copy of the order of the county court as recorded in the Minute Book C, in my office, on pages 550, 551, and 552.

[SEAL.] J. P. ALFORD,
County Clerk of Harrison County, Texas.

Be it remembered that the honorable the county court of Harrison county met this day, June 10th, 1872, pursuant to law.

Present: J. P. Lynch, county judge *pro tem.;* A. S. Justus and J. A. Price, justices of said court; C. E. Bolles, clerk, by Dan. S.
141 Hawley, deputy clerk, and W. H. Poland, sheriff.

The court having met in special session for the purpose of receiving and acting upon the return of the election heretofore ordered and held upon the proposition to donate to the Texas & Pacific Railroad Company the sum of $300,000 in the bonds of Harri-

son county, Texas, payable in thirty years and bearing interest, payable in gold, at seven per centum per annum, which return was made to the court by the managers of said election on the 7th of June, 1872, and said return being examined and considered by the court, and it appearing to the court that Ed. Bussy, one of the managers appointed to conduct said election, failed to appear and act as such at the time appointed for said election, and the other managers appointed to conduct said election having filled the vacancy caused by such failure of said Bussy to act by the appointment of W. W. Heartsill as a manager to conduct said election, and it further appearing to the court that said election was conducted according to law, and the court having examined said returns and ascertained that at said election there were 1,891 votes cast, of which 1,866 votes were cast in favor of said proposition and donation and 25 votes were cast against said proposition and donation, and it appearing to the court that more than two-thirds of the qualified voters of the said county of Harrison at said election voted in favor of said appropriation and donation, it is therefore considered
142 and adjudged by the court that said proposition and donation have been adopted by the requisite number of voters of said Harrison county, and that said donation of $300,000, payable and bearing interest as aforesaid, is declared to be made by said county of Harrison to said Texas & Pacific railroad; and it is further considered and ordered by the court that as soon as said Texas & Pacific Railroad Company shall permanently establish its eastern terminus at the city of Marshall, and thereby secure at said city the connections, the said terminus provided by the act incorporating the said Texas and Pacific Railroad Company, and shall also establish in said city of Marshall the Texas office of said railroad company, and shall also establish and construct at the said city of Marshall the main shops of said railway, the court shall issue to the said Texas & Pacific Railroad Co. the bonds of said county of Harrison for the sum of $300,000, which bonds shall be in sums of not less than $100 and not more than $1,000 each, shall be payable thirty years after date, and shall bear interest at the rate of seven per centum per annum, payable in gold coin.

I certify that the foregoing is a true and correct copy of the order of the county court of Harrison county, Texas, as it appears on record in Minute Book C, on pages 558 & 559, of my office.

[SEAL.] J. P. ALFORD,
County Clerk of Harrison County, Texas.

143 MONDAY, *April 6th*, 1874.

The court met this morning pursuant to adjournment.

Present and presiding: J. K. Williams. Present also: L. J. Gallauk, E. J. Brown, and M. F. Hawkins.

The petition of the Texas & Pacific Railway Company on subsidy question taken up and represented as before, pending which the court adjourned until to-morrow morning at 9 o'clock a. m.

And now comes on to be heard the application of the Texas & Pacific Railway Company praying the court to issue the bonds of

the county of Harrison, in the State of Texas, to the said Texas & Pacific Railway Co. in the sum of $300,000, payable thirty years after date and bearing interest at the rate of seven per centum per annum, payable in gold coin, pursuant to the order and judgment of this court given and entered on the 10th day of June, 1872, and also praying the court to levy an annual tax upon all real and personal property situated in said county of Harrison sufficient to pay the annual interest and not less than two per cent. annually of the principal of said bonds, besides the expenses of assessing and collecting the same; and also comes on to be heard the opposition to said application filed by N. V. Board and others, citizens of said county of Harrison, and the court having heard the evidence adduced by the parties, the argument of counsel, and being satisfied from the evidence that the condition upon which said bonds
144 were required by said order and judgment of the said county court of Harrison county on the said 10th day of June, 1872, to be issued by said county court to said railway company have been fully complied with and performed by said company, and the court being also satisfied from the evidence that the donation of said sum of $300,000, payable and bearing interest as aforesaid, had been made by said county of Harrison to said railway company in accordance with the laws in such cases provided—

It is therefore ordered and considered by the court that an annual tax of three-fourths of one per cent. be, and is hereby, levied upon all the real and personal property situated in said county of Harrison to pay the annual interest in gold coin on the bonds to be issued to the said railway company by said county of Harrison as aforesaid, and also to pay not less than two per centum annually of the principal of said bonds; also to pay the expenses of assessing and collecting said tax; the said two per centum in payment of principal and expenses to be payable in United States currency; and it is further ordered and considered by the court that the bonds of said county of Harrison to the amount of $300,000 be issued by the said county of Harrison to the said Texas & Pacific Railway Co.; that said bonds be in sums and of the denominations as follows, to wit, two hundred bonds for the sum of one thousand dollars each, one hundred and fifty bonds of the sum of five hundred dollars each, two hundred and
145 fifty bonds of the sum of one hundred dollars each; that they be made payable thirty years after the date of this order of judgment; that they bear interest at the rate of seven per centum per annum, payable in gold coin; that they be signed by the presiding justice of this court and attested by the clerk with the seal of the court, and that they be presented for registration in the office of the comptroller of the State of Texas and delivered to the said Texas & Pacific Railway Company.

I certify that the foregoing is a true and correct copy of the order of the county court of Harrison county, Texas, as it appears of record on the minutes of said court in Minute Book C, on pages 608, 609, and 610, of my office.

J. P. ALFORD,

[SEAL.] *County Clerk of Harrison County, Texas.*

STATE OF TEXAS,
County of Harrison.

Know all men by these presents that whereas an agreement was made and entered into on the 22nd day of June, 1872, by and between the City of Marshall and the Texas & Pacific Railway Co., by which the City of Marshall agreed to donate to said company sixty-six acres of land at the place and in the shape designated on the map of the city of Marshall by Col. Thomas A. Scott, president of said company, whereon to locate the main machine shops, car
146 works, and depot of said company at said city, and the said Texas & Pacific Railway Company agreed to permanently establish its eastern terminus and Texas office at the city of Marshall, and also to establish and construct at said city the main machine shops and car works of said railway company.

And whereas the City of Marshall having acquired from the previous owners thereof the title to all the land desired by the said Texas & Pacific Railway Company, except two small tracts or parcels, the titles to which are now vested in minor heirs and cannot be procured without the action of the district court of Harrison county, and which will be paid for and conveyed by said City of Marshall as soon as said action can be had;

And whereas the City of Marshall having, by a resolution passed by the mayor and common council of said city on the 30th day of September, A. D. 1872, directed a deed of conveyance of said land from said city to said Texas & Pacific Railway Company to be made and executed:

Now, therefore, in consideration of the premises above recited, as well as in consideration of one dollar paid to the said City of Marshall by the said Texas & Pacific Railway Company, receipt whereof is hereby fully acknowledged, the said City of Marshall does hereby give, grant, bargain, sell, alien, convey, confirm, and deliver unto the said Texas & Pacific Railway Co. the following-described
147 tracts and parcels of land, to wit, situated in Harrison county, in State of Texas, and bounded as follows:

Lots numbered one and three (1 & 3), in block numbered forty-six (46), in the railroad addition to the city of Marshall; also the following-described tract of land, containing sixty-six acres of land, more or less, and bounded as follows:

Beginning at a point on the north side of the railroad track and fifty (50) feet from middle of same, near west end of first curve west of railroad depot, a stake from which a forked red oak bears S. 3 E., distant 25 feet, marked X, thence N. 13½ E. 185 feet to projected middle line of railroad track; thence in same direction 650 feet to stake in S. B. Rainey's field; thence S. 76½ E. 79 feet to west boundary of lands of the Harrison County Agricultural and Mechanical Association, Rainey's east line, 1,362 feet to James Turner's line, 2,400 feet to Jefferson road, 3,251 feet to Port Caddo road, 4,800 feet to stake in Hynson's field, 35 feet west of the eastern fence; thence S. 13½ W. 325 feet to a stake north of the center line of the railroad track at a point on the right line between a large red oak

on the north side and a large sweet-gum on the south side of said track; thence westwardly, parallel to the center line of said track and fifty feet therefrom, excepting in blocks 51 and 52, where said west-
wardly line is one hundred feet from said center line of
148 said railroad track, to the place of beginning, excepting from
the 66 acres tract hereinabove described twenty-one and sixty-six one-hundredths ($21\frac{66}{100}$) acres which now belong to the heirs of Mrs. Hynson's estate, described as follows: Commencing at a said point in the Port Caddo road where it is crossed by the north boundary line of the tract hereinabove described, thence S. 76½ E. 1,549 feet to a stake in Hynson's field 25 feet west of his eastern fence, the N. E. corner of the tract hereinabove described; thence S. 13½ W. 325 feet to a stake 50 feet north of the center line of the R. R. tract· thence westwardly parallel with the center line of said railway tract and fifty feet therefrom to the east boundary line of Mrs. Craig's tract; thence north to a stake on the eastern boundary line extended of James Turner's 13-acre tract; thence along said east boundary of Turner's tract to the Port Caddo road; thence along the line of said road in the center thereof to the place of beginning, containing, as above stated, twenty-one and sixty-six one-hundredths acres, more or less, and further excepting from the said 66-acre tract hereinabove described a small tract belonging to the heirs of Dr. Eames, lying on the north side of the railroad tract east of the twenty-two one-hundredths ($\frac{22}{100}$) acre
tract conveyed by Joseph Mason to the city of Marshall and
149 west of the eighty-three one-hundredths ($\frac{83}{100}$) acre tract
conveyed by Lee Saunders and wife and F. A. Richardson to the city of Marshall, and between the lands of the railroad reservation on the south and the lands conveyed by S. B. Rainey and the Harrison County Agricultural and Mechanical Association to the city of Marshall on the north, containing fifty-eight one-hundredths ($\frac{58}{100}$) of an acre, more or less, together with all and singular the rights, members, hereditaments, appurtenances to the same belonging or in anywise incident or appertaining; to have and to hold the said land above described to the only proper use and benefit of the said Texas & Pacific Railway Company in accordance with the agreement hereinbefore recited, and to enable said company to locate thereon its principal machine shops and car works, as hereinbefore specified, and the said city of Marshall does hereby warrant and defend the right and title to the land aforesaid to the said Texas & Pacific Railway Company against the claims of any and all persons whomsoever claiming or to claim the same or any part thereof.

In testimony whereof the mayor of the city of Marshall has hereunto signed his name and caused the same to be signed by the recorder of said city, and the seal of the said city to be affixed hereunto. The words "on the north," in the second line from
150 the bottom of the fourth page, interlined before signing.

Done at the city of Marshall on this the 30th day of September, A. D. 1872.

J. K. WILLIAMS,
Mayor of the City of Marshall.
C. W. SLATER,
Recorder.

Signed, sealed, and delivered in the presence of—
L. M. FISHER.
W. L. SLOAN.

STATE OF TEXAS,
County of Harrison.

Before me, H. D. Smith, a justice of the peace and notary public personally appeared J. K. Williams and C. W. Slater, grantors of the above deed or instrument of writing, bearing date of the 30th day of September, A. D. 1872, and acknowledged they had signed the same for the purposes and considerations therein expressed; to certify to which I hereunto set my hand and official seal, at Marshall, Texas, this the 30th day of September, 1872.

H. D. SMITH,
J. P. and N. P.

I certify the foregoing to be a true and correct copy of the original deed and certificates of proof as filed in my office July the 30th, 1873, at 11 a. m., this the 23rd day of August, A. D. 1873.

C. E. BOLLES, *Clerk*,
By D. S. HAWLEY, *Deputy*.

151 I certify that the above and foregoing is a true and correct copy of the deed from the city of Marshall to the Texas & Pacific Railway Co., as recorded in my office in Record Book I, pages 455, 456, and 457.

[SEAL.]

J. P. ALFORD,
County Clerk, Harrison County, Texas.

STATE OF TEXAS,
County of Harrison.

Know all men by these presents that I, James Turner, a citizen of Harrison county, Texas, in consideration of the sum of two hundred and seventy-five dollars, to me in hand paid, have this day bargained and sold, and by these presents bargain, sell, alien, and convey, to the city of Marshall all that tract or parcel of land situated on the north side of the railroad track within the corporate limits of the town of Marshall and described as follows:

Beginning at a stake at the southeast corner of the lot now owned by Peter Wolf, thence north with said Wolf's east boundary line to his northeast corner; thence east 60 feet to the stake; thence south to the railroad; thence west 60 feet to the place of beginning, being 60 feet front on the railroad and running back to a line with said Wolf's north boundary line, the above being the lot sold by me

to Franklin Poe and now at his instance conveyed to the said city of Marshall; to have and to hold all and singular the prem-
152 ises aforesaid to the said city of Marshall and its assignees and successors forever, with all and singular the rights, members, and appurtenances to the same belonging, and I will warrant and forever defend the title to the aforesaid premises against the lawful claim or claims of any and all persons whatsoever claiming or to claim the same or any part thereof.

Witness my hand and scroll for a seal this September 13th, A. D. 1872.

JAMES TURNER.

Witness:
W. C. ECTOR.
W. STEADMAN.

STATE OF TEXAS, }
County of Harrison. }

Before me, C. E. Bolles, clerk of the district court of Harrison county, personally appeared W. D. Ector, who, upon oath, says that the said James Turner, the grantor of the annexed deed, bearing date of the 13th day of September, 1872, subscribed the same, and that he acknowledged in his presence that he had subscribed and executed the same for the purposes and consideration therein stated, and that he had signed the same as a witness at the request of said grantor.

To certify which I hereunto sign my name and affix the seal of my office, at the said city of Marshall, this 24th day of July, 1873.

C. E. BOLLES, *Clerk.*

I certify the foregoing to be a true and correct copy of the
153 original deed and certificates of proof as filed in my office July 24th, 1873, at 5.30 p. m., this the 23rd day of August, 1873.

C. E. BOLLES, *Clerk,*
By D. S. HAWLEY, *Deputy.*

I certify that the foregoing is a true and correct copy of the deed from James Turner to the city of Marshall, as recorded in my office in Record Book I, pages 457 and 458.

[SEAL.]

J. P. ALFORD,
County Clerk of Harrison County, Texas.

Commissioner's Court. Call Term, 1879, July 12th.

The honorable commissioners' court met this day pursuant to call made by the Hon. Geo. Lane, county judge, July 3rd, 1879, Hon. Geo. Lane presiding; also present A. R. Starr, W. P. Blocker, and J. D. Rudd, commissioners; S. R. Perry, sheriff; J. P. Alford, clerk.

Ordered by the court, That the Hon. George Lane, county judge, or A. R. Starr, county commissioner, be authorized to correspond with holders of bonds granted by the county of Harrison, State of

Texas, to the Texas & Pacific Railway Company in reference to issuing new bonds in lieu thereof by virtue of an act of the 16th Legislature of the State of Texas, approved March 25th, 1879, said new bonds not to be for more than twenty-five per cent. of the old bonds and to bear not more than five per cent. per annum interest, this court reserving the right not to close any settlement with
154 any parties till, in the opinion of the court, a sufficient number of the holders of the bonds have accepted the above payment to justify said settlement, the resources of the county being such that the pay in full of said old bonds is an impossibility. It was suggested that the above order be published in the newspapers of this county.

County Commissioners' Court. February Term, 1880, Monday, February 10th, 1880.

The honorable court met this day in regular session, Hon. Geo. Lane, county judge, presiding; present, also, A. R. Starr, J. D. Rudd, and W. P. Blocker, commissioners; S. R. Perry, sheriff, and J. P. Alford, county clerk.

At a meeting of the people of Harrison county on Monday the — day of February, 1880, it was resolved that the county commissioners' court of said county should use some means to get in correspondence with the holders of railroad subsidy bonds of said county and use efforts to effect a compromise of said bonds with the holders thereof on just and equitable terms. It is ordered that E. J. Fry, Geo. Lane, county judge, and A. R. Starr, county commissioner, be, and they are hereby, appointed a committee to employ some person to correspond with the persons who hold said bonds and learn from them what compromise can be made with them. The said person so employed is instructed to offer in compromise to the hold-
155 ers of said bonds new bonds of less amount, as contemplated in an act of the Legislature of the State of Texas entitled "An act to authorize any county, city, or town in this State to compromise existing bonded indebtedness and to issue new bonds to be sold or exchanged for this purpose and to provide for efficient collection of taxes to pay the principal and interest of such new bonds, approved April 18th, 1879."

Commissioners' Court. May Term, 1880.

The honorable court met this day in regular session with A. R. Starr, J. E. Hooper, and W. P. Blocker and J. D. Rudd, commissioners; S. R. Perry, sheriff, and J. P. Alford, county clerk, the court, A. R. Starr, presiding.

Whereas a proposition has been made to the holders of the Harrison County Texas & Pacific railway subsidy bonds to compromise the same by issuing new bonds in lieu thereof for fifty per cent. of the principal of the said old bonds and fifty per cent. of all matured interest not barred by the statute of limitation, said new

to Franklin Poe and now at his instance conveyed to the said city of Marshall; to have and to hold all and singular the premises aforesaid to the said city of Marshall and its assignees and successors forever, with all and singular the rights, members, and appurtenances to the same belonging, and I will warrant and forever defend the title to the aforesaid premises against the lawful claim or claims of any and all persons whatsoever claiming or to claim the same or any part thereof.

152

Witness my hand and scroll for a seal this September 13th, A. D. 1872.

JAMES TURNER.

Witness:
W. C. ECTOR.
W. STEADMAN.

STATE OF TEXAS,
County of Harrison.

Before me, C. E. Bolles, clerk of the district court of Harrison county, personally appeared W. D. Ector, who, upon oath, says that the said James Turner, the grantor of the annexed deed, bearing date of the 13th day of September, 1872, subscribed the same, and that he acknowledged in his presence that he had subscribed and executed the same for the purposes and consideration therein stated, and that he had signed the same as a witness at the request of said grantor.

To certify which I hereunto sign my name and affix the seal of my office, at the said city of Marshall, this 24th day of July, 1873.

C. E. BOLLES, *Clerk.*

I certify the foregoing to be a true and correct copy of the original deed and certificates of proof as filed in my office July 24th, 1873, at 5.30 p. m., this the 23rd day of August, 1873.

153

C. E. BOLLES, *Clerk,*
By D. S. HAWLEY, *Deputy.*

I certify that the foregoing is a true and correct copy of the deed from James Turner to the city of Marshall, as recorded in my office in Record Book I, pages 457 and 458.

[SEAL.]

J. P. ALFORD,
County Clerk of Harrison County, Texas.

Commissioner's Court. Call Term, 1879, July 12th.

The honorable commissioners' court met this day pursuant to call made by the Hon. Geo. Lane, county judge, July 3rd, 1879, Hon. Geo. Lane presiding; also present A. R. Starr, W. P. Blocker, and J. D. Rudd, commissioners; S. R. Perry, sheriff; J. P. Alford, clerk.

Ordered by the court, That the Hon. George Lane, county judge, or A. R. Starr, county commissioner, be authorized to correspond with holders of bonds granted by the county of Harrison, State of

Texas, to the Texas & Pacific Railway Company in reference to issuing new bonds in lieu thereof by virtue of an act of the 16th Legislature of the State of Texas, approved March 25th, 1879, said new bonds not to be for more than twenty-five per cent. of the old bonds and to bear not more than five per cent. per annum interest, this court reserving the right not to close any settlement with
154 any parties till, in the opinion of the court, a sufficient number of the holders of the bonds have accepted the above payment to justify said settlement, the resources of the county being such that the pay in full of said old bonds is an impossibility. It was suggested that the above order be published in the newspapers of this county.

County Commissioners' Court. February Term, 1880, Monday, February 10th, 1880.

The honorable court met this day in regular session, Hon. Geo. Lane, county judge, presiding; present, also, A. R. Starr, J. D. Rudd, and W. P. Blocker, commissioners; S. R. Perry, sheriff, and J. P. Alford, county clerk.

At a meeting of the people of Harrison county on Monday the — day of February, 1880, it was resolved that the county commissioners' court of said county should use some means to get in correspondence with the holders of railroad subsidy bonds of said county and use efforts to effect a compromise of said bonds with the holders thereof on just and equitable terms. It is ordered that E. J. Fry, Geo. Lane, county judge, and A. R. Starr, county commissioner, be, and they are hereby, appointed a committee to employ some person to correspond with the persons who hold said bonds and learn from them what compromise can be made with them. The said person so employed is instructed to offer in compromise to the hold-
155 ers of said bonds new bonds of less amount, as contemplated in an act of the Legislature of the State of Texas entitled "An act to authorize any county, city, or town in this State to compromise existing bonded indebtedness and to issue new bonds to be sold or exchanged for this purpose and to provide for efficient collection of taxes to pay the principal and interest of such new bonds, approved April 18th, 1879."

Commissioners' Court. May Term, 1880.

The honorable court met this day in regular session with A. R. Starr, J. E. Hooper, and W. P. Blocker and J. D. Rudd, commissioners; S. R. Perry, sheriff, and J. P. Alford, county clerk, the court, A. R. Starr, presiding.

Whereas a proposition has been made to the holders of the Harrison County Texas & Pacific railway subsidy bonds to compromise the same by issuing new bonds in lieu thereof for fifty per cent. of the principal of the said old bonds and fifty per cent. of all matured interest not barred by the statute of limitation, said new

bonds to run twenty years and bear six per cent. interest per annum; and whereas numerous holders of said old bonds have signified their willingness to accept said proposition: Now, therefore, it is ordered by the county commissioners' court of said Harrison county, State of Texas, that an election be had in said county by the property tax-payers thereof to decide whether said compromise shall be carried out and said new bonds issued; said elec-
156 tion to be held at the various election precincts in said county, as now established, on Tuesday, the 15th day of June, 1880; and it is further ordered that this order be published in the Marshall Messenger and Tri-Weekly Herald from this date to the date of said election, and that the law authorizing the proposed compromise be also published in connection with this order.

WEDNESDAY, *August 18th*, 1880.

It is ordered by the honorable county judge, Geo. Lane, that a called meeting of the commissioners' court be, and is hereby, ordered to be held at the court-house in Marshall on the 3rd Tuesday in August, it being the 24th day of August, 1880, and that he issue notices to the several commissioners of the county.

The honorable court met pursuant to call, Hon. Geo. Lane, county judge, presiding; present, also, W. P. Blocker, J. D. Rudd, and A. R. Starr, commissioners; S. R. Perry, sheriff, and J. P. Alford, clerk.

Ordered by the court, That an ad valorem tax of one-tenth of one per cent. be levied on all the taxable property in Harrison county to provide for the payment of the judgment in the United States circuit court of the eastern district of Texas, No. 1707, G. S. C. Dow *vs.* George Lane *et als.*, in accordance with the peremptory writ of mandamus issued from said court on the 10th day of June, 1880, and that a certified copy of this order be made out by the clerk
157 and served on J. M. Calloway, assessor of Harrison county.

WEDNESDAY, *September 9th*, 1880.

It is ordered by the honorable county judge, George Lane, that a called meeting of the commissioners' court be, and is hereby, ordered to be held at the court-house, in Marshall, on the 2nd Tuesday in September, 1880, it being the 14th day of September, 1880, and that the clerk issue notices to the several commissioners.

The honorable court met pursuant to call made by the Hon. Geo. Lane, county judge.

Presiding: Geo. Lane, county judge.

Present: A. R. Starr, J. D. Rudd, and W. P. Blocker, commissioners; S. R. Perry, sheriff, and J. P. Alford, clerk.

Ordered by the court, That the report of George Lane, county judge, and A. R. Starr, county commissioner of precinct No. 3, — to the employment of Messrs. Garrett & Key as agents to represent the county in the compromise of railway subsidy bonds issued to the railway company, be, and the same is hereby, approved, and that said Garrett & Key be invested with full power to carry out said compromise

as voted for by a majority of tax-paying citizens of Harrison county on the 15th day of June, 1880. They shall arrange for the surrender of said old bonds when the holders of same shall be ready to receive the new bonds, and upon due evidence of a surrender being made they shall call on the county judge and clerk of said county, who shall sign, seal, and deliver
158 the necessary amount of new bonds to said agents, and when any parties have a less amount of old bonds and coupons than is required to take up a new bond that said judge and clerk shall issue scrip under the seal of this court, redeemable in said new bonds, when presented in amounts of fifty or one hundred dollars, and said Garrett & Key be fully and generally authorized to do all acts which may be necessary in the premises; and it is further ordered by the court that whereas the election held on Tuesday, the 15th day of June, 1880, to authorize the compromise — the bonds issued by the county to the Texas & Pacific Railway Company was carried by a vote of a majority of the property tax-paying citizens of said county, it is therefore ordered that said compromise be, and the same is hereby, accepted, and that A. R. Starr and E. Key be authorized to have such amounts of new bonds lithographed as they may deem proper, the coupons on said new bonds to have the signatures of the county judge and the county clerk lithographed thereon, and such signatures lithographed have the same force and effect as if written; that said blank bonds shall be deposited for safe-keeping in the vault of said agents, and the same shall be signed and sealed by the county judge and county clerk, as provided in the foregoing order authorizing said Garrett & Key and county judge and county clerk to make the exchange of said new bonds for the old; and it is further ordered that said agents, Garrett &
159 Key, shall keep a full register of all bonds and coupons surrendered and all new bonds, coupons, and scrip issued, and shall make a written report to this court at each regular meeting thereof.

And it is further ordered that the county clerk shall procure a book in which he shall keep a register of all new bonds, coupons, and scrip issued and old bonds and coupons surrendered in lieu thereof.

I certify that the foregoing six pages of caligraph writing is a true and correct copy of a portion of the minutes of the county commissioners' court of Harrison county, Texas, as recorded in Minute Book A in my office, pages 223, 260, 267, 277, & 282.

[SEAL.] J. P. ALFORD,
County Clerk of Harrison County, Texas.

Filed Oct. 5th, 1886.

W. E. SINGLETON, *Clerk.*

UNITED STATES OF AMERICA, *Eastern District of Texas*, } ss:

I, W. E. Singleton, clerk of the circuit court of the United States of America for the eastern district of Texas, at Jefferson, in the fifth circuit, do hereby certify that the foregoing pages numbered from

No. 1 to 159, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The City of Marshall *vs.* The Texas and Pacific Railway Company, chancery No. 18, as the same remain of record and on file in said office.

160

Seal of United States Circuit Court, Eastern District of Texas, at Jefferson.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Jefferson, in the eastern district of Texas, in the fifth circuit, this thirty-first day of December, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the said United States the one hundred and eleventh year.

W. E. SINGLETON, *Clerk.*

Endorsed on cover: C. C. U. S., E. Texas. No. 293. The Texas and Pacific Railway Company & John C. Brown and Lionel A. Sheldon, receivers of the Texas and Pacific Railway Company, appellants, *vs.* The City of Marshall. Filed Febuary 3d, 1887. And No. 1105. The City of Marshall, appellants, *vs.* The Texas and Pacific Railway Company & John C. Brown & Lionel A. Sheldon, receivers of the Texas & Pacific Railway Company. Filed March 5, 1889.

Supreme Court of the United States.

OCTOBER TERM, 1889.

THE TEXAS AND PACIFIC RAILWAY Company and John C. Brown and Lionel A. Sheldon, Receivers of the Texas and Pacific Railway Company, *Appellants*, *vs.* THE CITY OF MARSHALL.	No. 293. Filed Feb'y 3, 1887.

THE CITY OF MARSHALL, *Appellant*, *vs.* THE TEXAS AND PACIFIC RAILWAY Company and John C. Brown and Lionel A. Sheldon, Receivers of the Texas and Pacific Railway Company.	No. 1105. Filed March 5, 1889.

Affidavit &c.

STATE OF TEXAS, *Harrison County.*

Before me Alexander S. Field, Clerk of the District Court in and for Harrison County, in said State of Texas, the same being a Court of record, on this day personally appeared James Turner, and T. P.

Young, known to me, and being by me sworn say on oath that they were the solicitors for the plaintiff in the case of City of Marshall vs. Texas and Pacific Railway Co., Chancery No. 18, tried at Jefferson in the United States Circuit Court, October 7th, 1886, and as such then represented, and have since represented, said plaintiff: that F. H. Prendergast, Esq., represented the defendant; that it was understood between the parties, and so stipulated by their respective solicitors in writing, at the time the case was tried, that each party should pay one-half the cost of the transcript on appeal; that both should have an equal right to said transcript on appeal, and that the whole case should be tried on the one record. That in accordance therewith the plaintiff did pay one half of said costs, and allowed the defendant's attorney to take charge of said transcript to be filed and docketed in the Supreme Court of the United States. That said attorneys for plaintiff did not learn that the cross-appeal of plaintiff had not been docketed until about March, 1889.

The affiants attach to this affidavit the stipulations to which reference is hereinbefore made.

JAMES TURNER,
T. P. YOUNG.

Sworn to and subscribed before me this 18th day of January, 1890.

[SEAL.] ALEX. S. FIELD,
Clerk District Court of Harrison County, Texas.

CITY OF MARSHALL *vs.* TEXAS & PACIFIC RAILWAY COMPANY, JOHN C. BROWN & L. A. SHELDON, Receivers of said Railway.	Ch. No. 18.

Whereas a decree was rendered in above case in the Circuit Court of the United States for the Eastern District of Texas at Jefferson, Texas, in November, 1886, from which decree both plaintiff and defendants appealed to the Supreme Court of the United States, and each party agree to pay and has paid one half the costs of the Transcript. Now it is hereby agreed that both plaintiff and defendants shall have equal right to use the transcript filed in the Supreme Court by the defendants.

F. H. PRENDERGAST,
Att'y for Tex. & Pac. and Receivers.
BOOTY & YOUNG,
for City of Marshall.

Endorsed. No. 18. The City of Marshall *vs.* The Texas & Pacific Railway Company. Agreement as to Transcript. Filed November 4, 1886. W. E. Singleton, Clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES,

For the Eastern District of Texas, at Jefferson.

I, W. E. Singleton, Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Jefferson, do hereby certify that the foregoing and attached one (1) pages of manuscript numbered in the margin of said pages from one ( ) to one (1) both inclusive, contain a full, true and correct copy and transcript of the original agreement as to transcript in cause Chy. No. 18, The City of Marshall *vs.* The

Texas and Pacific Railway Company, all of which appears from the records of said court, now in office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Circuit Court of the United States of America for the Eastern District of Texas, at Jefferson, at my office in said city of Jefferson, this 25th day of May, A. D, 1889.

W. E. SINGLETON,
[SEAL.) *Clerk of U. S. Circuit Court,*
Eastern District of Texas, at Jefferson.

MARSHALL, TEXAS, *Oct.* 29, 1886.

Judge C. B. SABIN,

DEAR SIR: We agree that the appeal bond tendered by the appellants The Tex. and Pac. R'wy Co. and Brown & Sheldon is amply sufficient in the case, City of Marshall *vs.* Tex & Pac. R'wy Co., and Brown & Sheldon.

JAMES TURNER,
BOOTY & YOUNG,
For Complainants.

MARSHALL, TEXAS, *Oct. 29th*, 1886.

Judge SABIN,

DEAR SIR: I agree that the appeal bond tendered by the City of Marshall is amply sufficient in the case of The City of Marshall *vs.* Tex. & Pac. R'wy Co. and Brown & Sheldon.

Yrs.,

F. H. PRENDERGAST,
Att'y for Tex. & Pac. and Brown & Sheldon.

Return all papers to me.

Yrs,

F. H. PRENDERGAST.

Ordered that these two stipulations be filed, Galveston, Tex., Oct. 30, 1886.

C. B. SABIN,
U. S. Dist. Judge for the East. Dist. Texas.

Filed Nov. 4th, 1886.—W. E. Singleton, Clerk.

The clerk will make out the transcript for appeal in the case of City of Marshall *vs.* Tex. & Pac. Ry. Co. & Receivers as herein directed put in the transcript the papers stated below, and in the order stated.

1. Defendant's prayer for appeal.
2. Order on same.
3. Defendant's appeal bond.
4. Defendant's citation and appeal and accepting of service.
5. Defendant's assignment of errors.
6. Plaintiff's application for appeal.
7. Order on same.
8. Plaintiff appeal bond.
9. Plaintiff citation on appeal and acceptance of service.
10. Plaintiff assignment of errers.
11. Original petition and Exhibits "A. & B."
12. Order of Judge Hazlewood.
13. Writ of injunction and return on same.
14. Petition to removal to U. S. Court.
15. Bond to removal to U. S. Court.
16. Order of removal (in separate paper).
17. Application to Judge Pardee and his order.
18. Defendant's demurrer.
19. Defendant's answer and exhibits "A. & B."
20. Complainant's joinder in demurrer.
21. Complainant's replication.

22. Agreement to hear cause on bill, demurrer, answer and evidence.

22-1-2. Decree of Court.

23. Testimony taken before J. B. Carter.

24. Copy from U. S. Court showing cases against the City of Marshall (plaintiff's evidence).

25. Statement showing number of hands employed in Aug., 1881, Nov., 1885 (do not copy the agreement attached). Just copy the statement only (Defend. Ev.)

26. Transcript from Commissioners' Court, Harrison County, (copy all that is in typewriting, but do not copy the manuscript copy at the end of the manuscript).

JAMES TURNER,
BOOTY & YOUNG,
Counsel for Complainant.
F. H. PRENDERGAST,
Counsel for Defendant.

Endorsed Ch. No. 18. Statement to clerk to make transcript. Filed November 22nd, 1886. W. E. Singleton, Clerk.

In the Circuit Court of the United States, for the Eastern District of Texas, at Jefferson.

I, W. E. Singleton, Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Jefferson, hereby certify that the foregoing and attached two (2) pages of manuscript numbered in the margin of said pages from one (1) to two (2), both inclusive, contain a full, true and correct copy and transcript of the original letter of James Turner and Booty

& Young, complainant's att'ys, to Judge C. B. Sabin, dated October 29th, 1886, stating sufficiency of the appeal bond, and letter of F. H. Pendergast, attorney for T. & P. Ry. Co., of same date, to Judge C. B. Sabin, agreeing to appeal bond of the City of Marshall, and the statement to clerk to make transcript filed November 22, 1886, in cause Chancery No. 18, The City of Marshall *vs.* The Texas & Pacic Railway Company, all of which appears from the records of said court, now in office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Circuit Court of the United States of America for the Eastern District of Texas, at Jefferson, at my office in said city of Jefferson, this 5th day of April, A. D. 1889.

W. E. SINGLETON,

[SEAL. *Clerk of U. S. Circuit Court,*
Eastern District of Texas, at Jefferson.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

No. 293.

THE TEXAS & PACIFIC RAILWAY COMPANY ET AL.,

Appellants,

vs.

THE CITY OF MARSHALL.

No. 1105.

THE CITY OF MARSHALL,

Appellant,

vs.

THE TEXAS & PACIFIC RAILWAY COMPANY ET ALS.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR THE RAILWAY COMPANY.

JOHN F. DILLON,
HARRY HUBBARD,
For the Texas & Pacific Railway Company.

C. G. Burgoyne's Printing Business, Cor. Centre and Walker Sts., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 293.

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,
Appellants,

vs.

THE CITY OF MARSHALL.

No. 1105.

THE CITY OF MARSHALL,
Appellant,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET ALS.

Brief for the Railway Company.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Statement of the Case.

THESE ARE APPEALS by the TEXAS AND PACIFIC RAILWAY COMPANY from a decree rendered by the United States

Circuit Court for the Eastern District of Texas in a suit wherein said company was defendant (Record p. 1), and by the CITY OF MARSHALL, the complainant in said suit, from the same decree (Record, p. 6). These two appeals will be considered together, as they present merely different phases of the same controversy, which it is proper that this Court should dispose of by a single judgment.

The original petition in the suit was filed in a State Court—the District Court of Texas, Harrison County (Record, p. 9); and a preliminary injunction was granted by that Court (Record, p. 18, *et seq.*). Upon petition of defendant the case was duly removed to the Circuit Court of the United States for the Eastern District of Texas, on the ground that the defendant Railway Company had a defense under the laws of the United States, to wit, that it was incorporated under an Act of Congress (Record, pp. 22–24). See *Pacific Railroad Removal Cases*, 115 U. S., 1. Upon complainant's petition to the United States Circuit Court the preliminary injunction was continued as an order of the Circuit Court, and the Receivers of the Texas and Pacific Railway property, JOHN C. BROWN and LIONEL A. SHELDON, were made parties to the suit (Record, pp. 25–28).

The defendants demurred to the complaint for want of equity (Record, p. 28); and also made answer thereto (Record, p. 29).

The complainants joined issue on the demurrer (Record, p. 39); and made replication to the answer (Record, p. 39).

The cause was heard upon the complaint, demurrer, answer, replication and evidence (Record, pp. 40, 41); and a final decree was rendered on the merits in favor

of the complainant, granting a perpetual injunction against the defendant company (Record, p. 41).

From this decree both parties have appealed to this Court, the defendant contending that no relief whatever should have been granted, and assigning errors to that effect (Record, p. 4), the complainant contending that further relief by way of a mandatory injunction should also have been granted (Record, p. 8).

THE PETITION OR BILL OF COMPLAINT (Record, p. 9), STATES, in substance :

That the defendant Railway Company, in consideration of a certain grant of county bonds by the County of Harrison, Texas, and of certain grants of lands by the complainant, the City of Marshall, agreed " to establish permanently the *eastern terminus* of the Texas and Pacific Railway at the City of Marshall, the county site of said county, and locate permanently at said city, in said county, *its legal domicil, Texas Office, main machine shops and car works* " ; that the said grants were accordingly made ; that " up to the year 1881, the defendant Railway Company kept said agreement in good faith by complying with all its terms " ; but, that since 1881 the defendant Railway Company has moved certain of its offices away from the City of Marshall, has moved " the termini of its Eastern or Northern Division (which had been from Texarkana [*sic*] to Marshall) from Texarkana to Longview," and has moved certain machinery from its machine shops at Marshall, and reduced the number of workmen employed in said shops.

THE RELIEF DEMANDED by the complainant was, in substance, that the Court enforce specific performance of the alleged contract on the part of the defendant Railway Company ; and for this purpose the complainant demanded a preliminary injunction (Record, p. 15),

" Enjoining and restraining the defendant and all its agents and servants from removing from the City of Marshall all of its offices, shops, and machinery and

portions of the same which are now in said city and have not heretofore been removed."

The plaintiff further demanded (Record, p. 15) that upon the final hearing this preliminary injunction be made perpetual; also that the defendant Railway Company

"Be required in all respects to fulfill and perform its agreement and contract * * * and that your Honor will issue a mandatory writ of injunction requiring the said defendant to restore and re-establish in the City of Marshall all the offices, shops, and machinery which have been removed therefrom."

THE ANSWER (Record, p. 29) was, in substance, as follows:

While it did not admit the contract as set up by the complaint, it admitted that the defendant Railway Company received a grant of bonds from Harrison County and of lands from the complainant, the City of Marshall, on condition that the Railway Company would "establish its eastern terminus and Texas office at the City of Marshall, and locate and construct at said city its main machine shops and car works." The answer averred (Par. II.) that the said Harrison County failed and refused to pay the interest on said bonds, and that a compromise with the holders on a fifty per cent. basis was effected. The answer denied that there was anything in the conditions on which the company received the county bonds which obliged the company *permanently* to keep its eastern terminus, Texas office, main machine shops or car works at the City of Marshall. The answer referred (Par. III.) to the deeds of conveyance of lands by the City of Marshall (which were attached to the answer as Exhibits "A" and "B," Record, pp. 35, 37), as showing all the conditions upon which said conveyances were made. The answer averred performance of all the conditions of the above-mentioned deeds, by the erection and maintenance of its main machine shops, round-house, &c., at Marshall. The answer (Par. V.) denied that the general Texas office of defendant was not in Mar-

shall before and at the time of the filing of complainant's bill, and until the Receivers appointed their own general superintendent. The answer (Pars. VI., VIII.) admitted that certain offices had been removed from the City of Marshall, and, in substance, that they were so removed for the purpose of better and more economical management of the company's affairs. The answer (Par. VII.) denied that certain removals, alleged in the complaint to have been made, had been made; denied (Pars. IX., XVI.) that the defendant had any intent to injure the complainant in making removals; denied (Pars. IX., X., XI.) that there had been any net reduction of the number of its employees at Marshall; and averred that, on the contrary, there had been an increase in such number; denied (Pars. XII., XIII.) that any of its machinery had been removed from its shops at Marshall, or that it had sent its rolling stock to other places for repairs, and, as a consequence, reduced its force in its shops at Marshall; denied (Par. XV.) that the defendants were about to remove any of the officers alleged in the complainant's bill to be in the City of Marshall, or that they were about to remove its shops or machinery from Marshall, or had threatened to do so; and denied (Pars. XVI., XVII., XVIII., XX.) all malicious intent, unlawful acts or fraud.

THE REPLICATION (Record, p. 39) denied the matter in the answer

"except the allegation as to the compromise of said bonds with the holders of the same and such other facts as are alleged in said bill and admitted in the answer."

THE EVIDENCE (Record, p. 48, *et seq.*) consisted chiefly of oral testimony, several witnesses for the complainant testifying as to their recollection of what various officers of the Railway Company and others said and did, and what was "understood" at the time the bonds and land were granted to the company. Their testimony is not referred to at length in this brief, for the reason that such indefinite and vague recollection evidently can

have no weight in determining the company's obligation as against the agreement in writing, least of all can it have weight for the purpose of enabling the Court thereby to ascertain such obligation in order to decree specific performance. It was not shown by evidence, and no attempt was made to show, what was meant by the various terms "Eastern terminus," "Texas office," "Main machine shops," and "Car works." Indeed, all the testimony assumes that these terms were indefinite and vague in their meaning. Several witnesses for complainant testified (Record, pp. 50, 53), that certain offices of the Railway Company had been removed from Marshall. They also gave testimony tending to show that certain machinery had been removed from the machine shops; but the testimony introduced by the defendant fully established the fact that no such removals had been made, or, if any had been made, the machinery removed had been replaced by other and better machinery. The statement at page 69 of the record also showed that the number and pay roll of the Railway Company's employees at Marshall at the time the bill was filed were greater than in 1881, up to which time the complainant alleges the company complied with all the conditions of the grants of bonds and lands. There was no evidence tending to show that the Railway Company threatened or intended remove its shops or to decrease the number of its employees. There was some testimony as to the supposed effect of the alleged removal of certain offices of the company upon the general prosperity of the city.

No further statement is here made of the evidence, which consisted almost entirely of vague and indefinite oral testimony, for the reason that such evidence is

obviously incompetent and without value or significance as a basis for decreeing specific performance.

DECREE. The Court granted the following relief in its decree (Record, p. 41):

"It is therefore ordered, adjudged and decreed by the Court that said complainant, The City of Marshall, have the right to have the said contract kept, observed and obeyed by the said defendant Railway Company, its officers, agents, servants and employees.

"It is further ordered, adjudged and decreed that the defendant, The Texas and Pacific Railway Company, and its Receivers, John C. Brown and Lionel A. Sheldon, and each of them and each and all of their officers, servants, agents and employees be restrained, enjoined and inhibited from removing the eastern terminus of said Railway Company, the Texas office of said Railway Company, the main machine shops and car works of said Railway Company, or any or either of the said office, main machine shops, or car works from the said City of Marshall, Texas, and that the said Receivers, John C. Brown and Lionel A. Sheldon, and each of them and the said Railway Company and each and every of their employees refrain from any and all act or acts in avoidance of said contract or this decree.

"That this injunction be made perpetual, and that writs of injunction be served upon each of said Receivers and the said Railway Company for the enforcement of this decree."

Assignment of Errors.

I.

The Court erred in perpetuating the injunction against the removal of the "main machine shops and car works" from Marshall, because the evidence did not show that any of said shops had been removed or threatened to be removed. This portion of the decree

is also erroneous because it does not define what constitutes the main machine shops and car works.

II.

The Court erred in perpetuating the injunction against the removal of the "Texas office" from Marshall because neither the evidence nor the decree shows what constitutes the "Texas office," and the defendants can not know when they are complying with the decree or when they are violating it, and, further, the plaintiff's allegations and evidence tend to show that what they call the "Texas office" has long since been removed from Marshall, and is not now at Marshall.

III.

The Court erred in enjoining the removal by the defendants of the "eastern terminus" of the Texas and Pacific Railway from Marshall, because neither the bill nor answer nor evidence nor the decree shows what constitutes the "eastern terminus," and because the eastern terminus was fixed at Marshall by the last section of the original charter of the Texas and Pacific Railway Company for the two Louisiana roads therein named to Marshall for a connection, and to prevent the Texas and Pacific Railway Company from building on to Louisiana to connect with said roads, and fixing the eastern terminus at Marshall was not done to control the internal affairs of said Texas and Pacific Railway Company.

IV.

The Court erred in enjoining the removal of the main machine shops and car works from Marshall, because the Court cannot compel the defendants to maintain and operate said shops at Marshall, and not being able to decree a performance of the whole contract it cannot decree a performance of a part.

V.

The Court erred in making any decree against the Texas and Pacific Railway Company because it appears that said railway and all of its property are in the hands of the defendants Brown and Sheldon, appointed by the United States Circuit Court of the Eastern District of Louisiana, and the said Texas and Pacific Railway Company are incapable of performing any decree that may be pronounced against them.

VI.

The Court erred in rendering any decree against the defendants John C. Brown and Lionel A. Sheldon, as Receivers, because said decree involves the management and control of said railway, of which they are Receivers and they are under the control of the United States Circuit Court for the Eastern District of Louisiana, and not under control of the Court making this decree.

VII.

Said decree is erroneous because the contract sued on and proved did not obligate the Texas and Pacific Railway Company to keep its offices and shops at Marshall for all time.

VIII.

The Court erred in perpetuating the injunction, because while it is in form an injunction the decree is in effect a decree for specific performance of a contract, which involves the employment of large numbers of men for an indefinite length of time, and also involves the exercise of personal skill and cultivated judgment and constant supervision, so that the Court has no adequate means of effectually enforcing its decree.

IX.

The Court erred in perpetuating the injunction, because the contract sued on, in so far as it attempts to

prevent defendants from locating their shops and offices elsewhere than at Marshall, is void as being against public policy.

X.

The Court erred also in not dismissing the bill of complaint and in rendering any decree against the defendants.

These defendants now appellants, pray the Supreme Court of the United States to reverse the decree rendered in the above cause on October 7th, 1886, by the Circuit Court for the Eastern District of Texas, and to remand the cause, with instructions to said Circuit Court to dismiss the bill.

ARGUMENT.

SUMMARY OF ARGUMENT.

The Contract (p. 11).

I. The Railway Company has completely fulfilled the contract (p. 13).

II. The contract is so indefinite and incomplete in its terms as to what the Railway Company agreed to do, that a Court of Equity will not attempt to enforce specific performance, but will leave the complainant to its action at law for damages, as a remedy for whatever rights it may have (p. 14).

III. It would be impracticable, if not impossible, for the Court to enforce specific performance of this contract, because the acts to be performed under it are complicated and numerous, and would require continued

supervision by the Court in order to render a decree effective. For this reason, also, specific performance should not be decreed (p. 22).

IV. Equity cannot enforce performance of this contract as of a negative covenant; both the contract and the decree are affirmative and require the performance of continuous affirmative acts (p. 31).

V. The contract was void as against public policy, and, therefore, will not be specifically enforced (p. 37).

VI. There was no contract *permanently* to maintain the "main machine shops" or "car works" at the City of Marshall. The decree was clearly erroneous in this respect (p. 44).

VII. The remedy of specific performance, even if it could be applied, would be harsh and oppressive to the Railway Company; if there is a valid contract and a breach thereof, the complainant has an ample remedy in an ordinary action at law for damages; and therefore specific performance should be refused (p. 45).

VIII. This Court should reverse the decree of the Circuit Court, and give directions to dismiss the bill, with costs (p. 48).

The Contract.

The Court below in its decree stated the contract as follows (Record, p. 41):

"The Court finds that a contract existed between the said complainant and the defendant, The Texas and Pacific Railway Company, by which, in consideration of the donation from Harrison County, Texas, in the

sum of three hundred thousand dollars in the bonds of said county and sixty-six cares of land donated by said complainant to said defendant Railway Company, *the said Railway Company agreed to permanently establish its eastern terminus and Texas office at the City of Marshall, and to also establish and construct at said City of Marshall the main machine shops and car works of said Railway Company.*"

In this finding the Court followed the written statement of the alleged contract as contained in the letter of F. B. Sexton and others, committee on the part of the City of Marshall, to Thomas A. Scott, President of the Texas and Pacific Railway Company, which letter is made part of the complaint and attached thereto as "Exhibit A" (Record, p. 16). The last paragraph of the agreement as stated in the letter is as follows:

"In consideration of the said sum of three hundred thousand dollars" (in bonds) "and said sixty-six acres of land, the said Texas and Pacific Railway Company will permanently establish its eastern terminus and Texas office at the City of Marshall, and will also establish and construct at said city the main machine shops and car works of said Railway Company."

This is the contract in writing as set up by the complainant, and is the only admissible evidence as to what the contract was.

In *Bast vs. Bank*, 101 U. S., 93, 96, Chief-Justice WAITE said:

"No principle of evidence is better settled at the common law that when persons put their contracts in writing it is, in the absence of fraud, accident or mistake, 'conclusively presumed that the whole engagement, and the extent and manner of their undertaking, was reduced to writing' (1 Greenl. Evid., Sec. 275)."

It is unnecessary to multiply authorities in support of this well known rule, and especially does this rule

apply in suits for specific performance. The complainant, therefore, cannot go outside this writing, either to show what the contract was or to add to its terms as there stated so as to make them definite and complete, and so make the contract in this respect capable of specific enforcement. But in the present case no attempt even was made to render the contract definite and complete by means of parol evidence. We are, therefore, confined to the terms of the contract as stated in the writing.

I.

The Railway Company has completely fulfilled the contract.

The word "*permanently*" in the above contract does not necessarily mean *forever*. The contract was completely fulfilled on the part of the Railway Company by its having constructed and maintained its "eastern terminus, Texas office, main machine shops and car works" in the City of Marshall for a period of many years. The word "*permanently*," as used in the contract, means only for a *reasonable* length of time—a location with the *intention* that it should be permanent—as contrasted with a mere temporary location. The following cases are in point :

Mead vs. Ballard, 7 Wall, 290.

Jeffersonville, Madison & Indianapolis Railroad Company *et al.* vs. Barbour, 89 Ind., 375.

II.

The contract is so indefinite and incomplete in its terms as to what the Railway Company agreed to do, that a Court of Equity will not attempt to enforce specific performance, but will leave the complainant to its action at law for damages, as a remedy for whatever rights it may have.

As has been shown (*supra*, p. 14), the parties cannot go outside the writing to render the terms of the contract definite and complete. But even if this could be done the complainant has not done it in the present case. A careful examination of the record shows that there is no evidence whatever to give definiteness and completeness to the terms of the written contract. We have, therefore, to consider only the contract as expressed in the writing.

None of the things to be performed by the defendant Railway Company are stated in the contract with sufficient fullness or definiteness to enable the Court to know what the company is required to do; and the Court has no means, consistent with its modes of procedure, of ascertaining these facts, or of ascertaining whether any decree it might render was in fact obeyed. "Eastern Terminus" means nothing definite. It may mean any one of a variety of things; and, such being the case, the Court will not say that it means one thing rather than another. So, also, "Texas office" means no particular thing. There is no specification of what officers or how many shall be in or constitute this office. The same may be said of the "main machine shops"

and "car works." These terms may mean any one of an indefinite number of things. The number and kind of men, the number and kind of shops and car works, are matters wholly unprovided for in the contract. It is hardly possible to conceive of a contract to which the objections of indefiniteness and uncertainty apply with greater force, as a reason for refusing to enforce specific performance, than they do to the contract now in question.

If any further argument were needed as to the indefiniteness and uncertainty of the contract, as a reason why specific performance should be refused, such argument is furnished in the language of the decree, which is as indefinite as the contract itself. The company is in terms enjoined (Record, p. 41):

> "From removing the eastern terminus of said Railway Company, the Texas office of said Railway Company, the main machine shops and car works of said Railway Company, or any or either of the said office, main machine shops or car works, from the said City of Marshall, Texas, * * * and refrain from any and all act or acts in avoidance of said contract or of this decree."

Nothing could be more indefinite than this decree. It leaves open and undecided all the questions as to what the company must do, and in precisely the same indefinite condition as they were left by the contract. Though the company may act in ever so good faith, it cannot know when it is obeying the decree, nor can the Court itself know when the decree is obeyed.

The authorities are unanimous that a court of equity will not enforce specific performance of such a contract.

"It is an elementary doctrine of the courts of equity

that they will not specifically enforce any contract, unless it be complete and certain."

Pomeroy on Specific Performance, Sec. 145.

Lord HARDWICKE, in *Buxton vs. Lister*, 3 Atk., 383, 386, said :

"Nothing is more established in this Court than that every agreement of this kind ought to be certain, fair and just in all its parts. If any of those ingredients are wanting in the case, this Court will not decree a specific performance."

The same rule prevails in this Court.

In *Colson vs. Thompson*, 2 Wheat., 336, 341, this Court said :

"The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy."

Specific performance is a remedy always in the discretion of the Court to refuse upon equitable grounds ; and,

"It should never be granted unless the terms of the agreement sought to be enforced are clearly proved."

Hennessy vs. Woolworth, 128 U. S., 438, 442, and authorities there cited.

See, also, Port Clinton Railroad Company vs. Cleveland & Tolelo Railroad Company, 13 Ohio St., 544, cited *infra*, p. 26, in which the contract was to operate a certain *railroad*.

THE CASE of *Wilson vs. Northampton & Banbury Junction Railway Company*, L. R. 9 Ch. Ap., 279, is directly

in point. This was a suit for specific performance of an agreement by which the promoters of the Railway Company, in consideration of the withdrawal of the plaintiff's opposition to their bill then pending before Parliament, agreed to *erect a station and works* upon the plaintiff's land. The part of the contract which referred to the station was as follows: "A *station* to be made on Nos. 24, 25 and 26, Parish of Wappenham, some part or parts thereof." The Railway Company, instead of constructing the station on plaintiff's land, began to construct one about two miles distant. Evidence was introduced to show, among other things, the great increase in value to plaintiff's land which would result from the construction and maintenance of the station if it should be built thereon.

But the Vice-Chancellor (BACON) declined to enforce specific performance, holding that it was a case for damages; and the Court of Appeals sustained his decision. In giving his opinion, the Vice-Chancellor said:

"It is a matter left to me to say whether I will direct the building of the station or whether I will direct compensation to be made to plaintiff for the failure in building that station. Without t' e least disposition not to enforce to the utmost of my power the contract which the defendants have entered into, I believe, in my discretion, that it is more to the advantage of plaintiff, and more to the advantage of public justice, that I should direct an inquiry as to compensation than that I should make a decree for specific performance. The inquiry, in my opinion, may be carried on with perfect satisfaction. The plaintiff's allegation is, that his motive in agreeing to take this station was that the value of the land not taken by the Railway Company would be increased by its being capable of being adapted for building purposes. That is an element in his case, and will be entitled to consideration whenever damages are assessed. * * * Another reason is, that if I were to direct the erection of a station, I must specify either

now, or it must be specified by means of an inquiry in Chambers, what is meant by a station, what kind of station it is to be, upon what architectural specification it is to be constructed, with what materials and under what regulations; all of which things I have no means at present of ascertaining, and which, if they could be ascertained at all, could only be ascertained after long delay, at considerable expense, and with a most uncertain result at the end of it. The plaintiff, unfortunately, has entered into an agreement so vague in its terms that I cannot direct the present specific performance of it. It is only that a station shall be made on three parcels of land which are mentioned in the schedule, or some parts thereof, upon what part of the land it was to be made being left wholly undetermined and vague. If I were to direct specific performance I could only do it in the terms of the stipulation in the agreement, and the enforcing of those stipulations would be a matter that I should find great difficulty in, and which I could never dispose of satisfactorily to myself, nor, as I belive, to the advantage of the plaintiff."

And, on appeal, Lord Chancellor SELBORNE said:

"The principle which is material to be considered in the present case is, that the Court gives specific performance instead of damages, only when it can by that means do more perfect and complete justice. An agreement, which is not so specific in its terms or in its nature as to make it certain that better justice will be done by attempting specifically to perform it than by leaving the parties to their remedy in damages, is not one which the Court will specifically perform. Now, in this particular case, the only words expressing with certainty anything with which we have to deal, are the words of the engagement adopted by the company, that they will 'at their own cost, in a good, substantial, and workmanlike manner, erect, set up, and construct a station to be made on Nos. 24, 25, and 26, in the Parish of Wappenham, or some part or parts thereof.' If it had been the intention of the parties to exclude any contract as to the use of the station when erected, they could hardly have adopted better words for that purpose; for every word expressing what they are to do is applicable to the making of the station, and not to the using of it. It is suggested that an agreement to use the station must be implied, for that it could only have been intended to be erected with a view to use. That

the company were expected to use it is very probable, but it is not so expressed; and the Court, if it attempted to impose on the company anything like a definite obligation as to the use of the station, would not be executing the written agreement, but enlarging it. If the use can only be collected by implication, then in that respect the agreement is vague and indefinite. It is definite and not vague only as to erecting, setting up, and constructing something capable of being erected, set up, and constructed; but there is no other definition of what that thing is than that which is involved in the necessary meaning of the words 'a station.' I apprehend that that expression is definite to this extent—it means a stopping place on the line of railway, that is, a place at which traffic of some description may in a reasonable manner be taken up and set down by and from the carriages moving upon the line. To that extent it is definite and not vague, but the moment you suggest any considerations as to the nature and degree of the convenience and accomodation intended by the parties, then it is wholly vague and indefinite, and there are no elements which can enable the Court, adhering simply to the agreement, and not going beyond it, to determine how those uncertainties are to be reduced to certainties.

The Vice-Chancellor has thought that, under these circumstances, although the case is, in one sense, a strong one, being a case in which, the company say distinctly, "We admit ourselves to be bound by this agreement, but we refuse to perform it," still it is a case in which the Court cannot satisfactorily do justice by means of a decree for specific performance, and the best justice of which the case is capable will be done by giving damages.

It has been a matter of some surprise to us that the plaintiff should have been dissatisfied with that conclusion, for if the view which has been already expressed is correct, supposing the Court had given him specific performance, it could not have extended the express obligation of the Company, and therefore could only have given him the very minimum of that which is expressed in the terms creating the obligation, whereas, in the case of damages, as it appears to me, the plaintiff will be entitled to the benefit of such presumptions as, according to the rules of law, are made in courts both of law and equity against persons who

are wrongdoers in the sense of refusing to perform, and not performing their agreements. * * *

It appears to me, therefore, that substantial justice may in that way be done between the parties; but I do not see how it could possibly be done by way of specific performance."

If the Court cannot, consistently with justice and the principles of law, decree the specific performance of an agreement to erect a railway station, the kind of station not being definitely specified in the contract, much less will it give the relief asked for by the complainants in the present case.

In *Brace vs. Wehnert*, 25 Beav., 348, the Court was asked to enforce specific performance of a contract to build, on a piece of ground specified in the contract, "a good and substantial messuage or dwelling house and necessary outbuildings of the value of £1,400 at the least, according to the said plan thereof to be submitted to and approved by Thomas Brace, &c." No plan was submitted or approved. The Court decided that the contract was not definite enough to be specifically enforced.

The Master of the Rolls (SIR JOHN ROMILLY), giving the opinion, said.

"I think that the jurisdiction of this Court, in cases of specific performance, should not be diminished, and I concur in the cases which lay down, that if the thing contracted to be done can be made reasonably clear, the Court is bound to decree a specific performance. But I think not only that the cases, but the reasons for them, are too strong to warrant me in giving the plaintiff a decree for specific performance in this case.

"An agreement for building a house of a certain value is not one which this Court will direct to be specifically performed. The Court would have great difficulty in determining whether its decree had or had not

been performed, and it might lead to much litigation. In this case they could come to no satisfactory conclusion whether the house when built, with the necessary outbuildings thereto, was or not of the value of £1,400 at the least. * * * But there is an additional difficulty; these buildings are to be 'according to plan to be submitted to and approved of by Mr. Brace,' and in order that there may be no mistake in the matter, the defendant afterwards repeats the words of the contract, and he covenants that this is what he is to do. It is clearly impossible for this Court to decree this to be specifically performed. How can I determine on the plan? This contract is not only vague, but it raises difficulties to be found in all cases where a specific performance is asked of something which the Court has no means of enforcing, such as to make repairs, to write a book, or exercise a discretion which the Court cannot exercise. I could never compel Mr. Brace to approve a particular plan if submitted to him by the defendant. If I were to say he was bound to approve of any plan which is reasonable (and which I think I could not do) how could I determine upon its reasonableness? The evidence would be of the vaguest possible description. I might approve of a handsome plan, and afterwards find that the expense of building the house would be beyond £1,400. The cases where the plans are already prepared differ from the present. Here the parties must rely on the honor of each other for the performance of the contract, and in case of non-performance on their remedy by way of action at law for damages."

In *Norris v. Jackson*, 1 J & H., 519, the contract was that one party should make such alterations in a house and other premises as should make them fit in all respects for the use and occupation of the other party and his family and servants, these alterations to be the subject of future agreement, and that the other party should take a lease.

The Vice-Chancellor (WOOD), in giving the opinion, says:

"The first paragraph of the prayer shows in a

striking way the difficulty which arises upon indefinite contracts of this kind; for the terms of the agreement are there so expanded as to include the erection of farm buildings among the works which the plaintiff considers necessary to render the house and premises fit for his occupation."

In *Price vs. Corporation of Penzance*, 4 Hare, 506, the contract was "to cause to be erected and built a commodious and good market for the sale of fish and other commodities." The case was in the end amicably disposed of. But when it came on for a hearing the Vice-Chancellor (WIGRAM) said (p. 508):

"There is a difficulty upon the face of this bill, and one which commonly occurs in such cases; if I make a decree for the performance of the contract, how is the Court to know when the contract is performed?"

In *Stuart vs. London and Northwestern Railway Company*, 1 De G., M. & G. 721, the agreement was for the construction of a railway on plaintiff's land, and contained very elaborate specifications. Yet the Court held that it was not sufficiently definite to be specifically enforced.

See also South Wales Railway Company vs. Wythes, 5 De G., M. & G. 880.

Taylor vs. Portington, 7 De G., M. & G. 328.

III.

It would be impracticable, if not impossible, for the Court to enforce specific performance of this contract, because the acts

to be performed under it are complicated and numerous, and would require continued supervision by the Court in order to render a decree effective. For this reason, also, specific performance should not be decreed.

Courts of equity sometimes enforce specific performance even of affirmative contracts, provided the acts to be performed are simple in their nature and capable of being fully and finally performed by a single transaction; for, in such cases, the Court has the means of ascertaining what the defendant ought to do, and of compelling him to do it, and can also readily ascertain whether its decree has been obeyed. But Courts never attempt to enforce a contract which requires the performance of a perpetual succession of acts, or a contract which requires the performance of acts which are complicated and involve the exercise of skill and discretion, for in such cases the Court has no means of ascertaining definitely what the defendant ought to do, or of compelling him to do it, and the Court could never know whether its decree was being obeyed. A decree for specific performance in such cases would involve the Court in the perpetual supervision of complicated undertakings, which it would have neither the time nor means of giving. The specific performance sought in the present case is of such a contract, and should therefore be refused.

The complainant in the present case substantially asks the Court to undertake the care and management of the affairs of a great railway company, and to do this forever. For the Court to interfere with the company,

and direct where it shall keep its offices, and how many and what kind of officers it shall keep; where it shall keep its machine shops and car works, and what kind of shops and car works, and how many men it must employ in them; where it shall have its terminal stations, and what shall constitute such stations—for the Court to direct the railway company in such matters, is to undertake the management of the whole railway. Nothing less than a knowledge, at least, of the entire business of the railway company would enable the Court to do justice in directing what the company should do in these respects. It is submitted, both on reason and authority, that the Court will not undertake such a task.

The general doctrine on this point has been well stated by Mr. POMEROY (Specific Performance) as follows:

"SEC. 288. Finally, although the contract may be valid, and in its nature capable of being performed, and the defendant competent to perform, the Court may be unable, by its ordinary administrative instruments and with any reasonable exercise of its judical and executive functions, to enforce and carry into effect the decree which it might render. Although the rendering a decree ordering such and such acts to be done may be easy, still, if the Court has no means and instruments for making its decision effective, and compelling obedience to its mandates, its decree would be nugatory, and will not be granted."

"Sec. 307. II. *Contracts having such terms and provisions that the Court is unable to carry into effect its decree for a specific performance.* In this class of agreements, which is by far the most numerous and important, the jurisdiction is declined, not because it is impossible to formulate a decree which shall order everything necessary for a complete performance, nor even because a compulsory execution of such decree is absolutely, and, in the nature of things, impossible, but be-

cause the enforcement of the decree would unreasonably tax the time, attention, and resources of the Court, and thereby interfere too much with its public duties towards other suitors, and in the general administrationof justice. Take the case, which is the extreme one, of a contract for the construction of an extensive line of railway. It is plain that a court of equity can render and put into a proper form a decree ordering the specific execution of this contract, with about the same ease that it can make a decree ordering the execution and delivery of a deed of conveyance with the requisite covenants and other provisions. It is also plain that, by means of a comprehensive and minute scheme of operations, prepared by experts, and by the help of special masters overseeing the work and reporting its progress from time to time, the Court might enforce this decree, although months, or even years, should be required for its completion; but to do so would occupy the care, attention and time of the Court, to the exclusion of other matters, and to the manifest detriment of the public business. A judicial tribunal cannot thus sacrifice the interest of other suitors, and even of society, for any benefit which might accrue to individual parties. For this reason, rather than from any inherent and absolute impossibility, equity refuses to exercise its jurisdiction under such circumstances."

SEC. 312. Contracts whose performance would be continuous. Finally, contracts which by their terms stipulate for a succession of acts, whose performance cannot be consummated by one transaction, but will be continuous, and require protracted supervision and direction, with the exercise of special knowledge, skill or judgment in such oversight—such as agreements to repair or to build, to construct works, to build or carry on railways, mines, quarries, and other analogous undertakings—are not, as a general rule, specifically enforced."

In the well known case of *Marble Company vs. Ripley*, 10 Wall., 339, this Court (STRONG, J.) said (p. 358):

"Another serious objection to a decree for a specific performance is found in the peculiar character of the contract itself, and in the duties which it requires of

the owners of the quarries. These duties are continuous. They involve skill, personal labor, and cultivated judgment. It is in effect, a personal contract to deliver marble of certain kinds, and in blocks of a kind, that the Court is incapable of determining whether they accord with the contract or not. The agreement being for a perpetual supply of marble, no decree the Court can make will end the controversy. If performance be decreed, the case must remain in Court forever, and the Court to the end of time may be called upon to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was sound, whether it was of suitable size or shape, or proportion. * * * It is manifest that the Court cannot superintend the execution of such a decree. It is quite impracticable. And it is certain that equity will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder. Many of the difficulties in the way of decreeing specific performance of a contract, requiring as this does, continuous personal action, and running through an indefinite period of time, are well stated in *The Port Clinton Railroad Company vs. The Cleveland and Toledo Railroad Company*, 13 Ohio St., 544."

The special attention of this Court is called to the case of *Port Clinton Railroad Company vs. Cleveland and Toledo Railroad Company*, 13 Ohio St., 544 (cited *supra* in *Marble Company vs. Ripley*), for the reason that the law as there stated applies with especial force to the present case. Among other things, the Court says (p. 556):

" Even if the contract were sufficiently specific, so that the party, when ordered to operate the railroad, would know the manner and mode in which the order was to be obeyed, still the question of obedience to the order must necessarily be left open. And the question of obedience to such an order might come up for solution, not once, as in the case of the archway, the erection of which was ordered in *Storer vs. Great Western Railway* (2 Y. & C., 48), but in instances innumerable

and for an indefinite time. Instead of the final order being the end of the litigation, it would be its fruitful and continuous source, and that, too, of litigation not in the regular course of judicial proceedings, but irregularly, on a summary application. And such application to be made by either party, one when he conceived there had not been a faithful compliance with the order, and the other when exemption from some provision might be claimed on the ground of inability or unforeseen events. For though the law might give damages for the breach of the contract, a court of equity will not enforce it if from circumstances such enforcement becomes unreasonably harsh and oppressive and without any corresponding advantage to the party seeking performance. And if a Court should undertake to enforce a contract requiring continuous personal action and running through an indefinite period of time, it must necessarily reserve the power to relieve against any unjust, harsh or oppressive operation of its order, shown by circumstances unforeseen and occurring, it may be, years after the order was made."

In *Ross vs. Union Pacific Railway Company, Eastern Division*, 1 Woolw., 26, which was a suit for specific performance of a contract to construct a railroad, Mr. Justice MILLER said (p. 43):

"It seems to me, that to establish the general doctrine that contracts for building may be specifically enforced in equity, would be to invite into litigation, very many matters which are now generally settled by the parties on a basis much more beneficial to both; and that it would require the constant supervision of the Court, through its officers, in the conduct of affairs it is very poorly adapted to administer. The result of the Court's drawing to itself such a jurisdiction would certainly be far less remedial than the ordinary action for damages.

There is another consideration to be noted in this connection. If the act be done by the delinquent party, whether the plaintiff or the defendant here, were a single act, to compel which a single decree of the Court would be sufficient, a case would be presented very unlike that before us. Years must elapse before this work can be

done and paid for. At every step in its progress, the interposition of the Court, either by orders in this case, or by decrees in successive cases, may be invoked, if we are at this time to lend the aid of chancery to either of the parties. It is not difficult to foresee the mischiefs of such a course. The rule is settled, even in the English Chancery, where the jurisdiction is greatly extended in all such cases, that it will decree specific performance only when it can dispose of the matter by an order capable of being enforced at once; that it will not decree a party to perform a continuous duty extending over a number of years, but it will leave the opposite party to his remedy at law."

After stating and referring at length to *South Wales Railway Company vs. Wythes*, 1 K. & J., 186 (s. c. 5 De G., M. & G., 880), Mr. Justice MILLER continues (and the remarks are especially pertinent in the present case):

"It will be observed that the infirmity of uncertain and vague stipulations is common to that and this contract, for this line of road remains unlocated, and, according to the usual course of such enterprises, must be subject to changes not possible now to foresee; and in this way differences irreconcilable between the parties, and which this Court cannot determine, may, and almost certainly will arise. So, too, as to the performance of the work, the same difficulties are very likely to occur. Then there is the great consideration of time."

See also Fallon vs. Railroad Co., 1. Dillon C. C. R., 121.

In *Powell Duffryn Steam Coal Co. vs. Taff Vale Ry. Co.*, L. R. 9 Ch. App., 331, the plaintiff sought by bill of injunction to restrain defendant from interfering with the right given by an Act of Parliament to plaintiff to run its locomotives over defendants' tracks. The Court was of opinion that the right to run locomotives over defendants' tracks could not be exercised with

safety unless all signals and points were used and managed by the defendants' own servants—that defendant ought not to be compelled to trust its points and signals to any other persons than its own pointsmen and its own signal-men. The Court then refused the injunction for the following reasons :

" If, therefore, relief is given to the plaintiffs, it must in substance involve ordering defendants to work the points and signals. But it is not the practice of this Court to compel by injunction either a company or an individual to do a continuous act which requires the continuous employment of people. The Court will in a proper case restrain a man from singing at one theatre, but it will not undertake to compel him to sing at another ; it may restrain him from writing a book for one publisher, but it cannot compel him to write a book for another. Where what is required is not merely to restrain a party from doing an act of wrong but to oblige him to do some continuous act involving labor and care, the Court has never found its way to do this by injunction. Both the learned Vice-Chancellors say that in all their experience they have never known such an injunction granted. My experience is the same. I think, therefore, that the order dismissing the bill must remain affirmed. At the same time it is to be observed that the plaintiffs come here to enforce a right which the Act of Parliament gives them, and that they do not fail on the merits. * * * The plaintiffs fail only because of the difficulty in the way of this Court enforcing such a right—a difficulty which to my mind is insuperable." The Court, therefore, dismissed the bill without costs.

Specific performance of an agreement to work quarries in a specified manner was refused.

Booth *v.* Pollard, 4 Y. & C., 61.

In *Pollard v. Clayton*, 1 K. & J., 462, the bill was for specific performance of a contract made by a coal company to sell and deliver all of certain beds of coal

at a specified price and in a specified manner, and for an injunction to restrain the coal company from selling to any one except the plaintiff. The contract was in its nature a continuing contract. The Vice-Chancellor allowed a demurrer to the bill. In the course of his opinion he said (p. 476):

"I should, therefore, have to make a decree on the one hand that the defendants continue the working of colliery, involving the employment of their capital and men, and all the other operations necessary in order to raise 500 tons per week; and on the other hand that the plaintiff continue the draining of the work, so as to enable these 500 tons per week to be raised. I can scarcely conceive a contract more difficult to be executed through the medium of a court of equity, or one in which more incessant applications must necessarily be made, to know whether, on the one hand, the defendants are putting their best strength forward in order to raise, with a given number of workmen, at a given rate of wages, the stipulated quantity of 500 tons per week; and whether, on the other hand, the plaintiff is performing his contract with full effect, in draining sufficiently and adequately the works which are in operation" (see also, *ib.*, p. 481).

It is perhaps at least a partial summary of the doctrine suggested in the foregoing points to say that this Court will not decree specific performance of a contract which does not afford, by its own terms, a clear and unmistakable test of compliance with its obligations; and that no decree of specific performance will be made where it is impracticable so to frame the terms of the decree as that they will afford an equally clear and unmistakable test of obedience to the mandate of the Court.

IV.

Equity cannot enforce performance of this contract as of a negative covenant; both the contract and the decree are affirmative and require the performance of continuous affirmative acts.

The injunction granted in the decree of the Court below (Record, p. 41), though negative and prohibitory in the mere form of words, was in reality and substance affirmative and mandatory. This fact is readily seen if we but consider what the complainant seeks to gain by this injunction, and what the decree attempts to give. The complainant does not seek the non-removal of the "eastern terminus"—whatever that may mean—or the non-removal of a lot of buildings in which the offices and shops of the defendant Railway Company are located. Such relief, at first glance, might seem to be what is asked for in the complaint and what is granted in the decree. Such a mistaken notion would give color to a view that the Court might give relief by way of prohibitory injunction, as in the case of a contract containing double covenants, both affirmative and negative, although it clearly could not give such relief by way of a decree commanding the performance of affirmative acts. If it were the mere removal of the buildings that the complainant seeks to enjoin, it might be urged with some plausibility that the Court could grant such relief by way of an injunction forbidding their removal. But what the complainant demands is that the Railway Company shall carry on its offices and shops and employ a large force of

men. A negative covenant, a covenant not to do a certain, defined and specific thing, requires no such affirmative acts; a negative covenant is obeyed by refraining from any action whatever. Test the present case by this principle: would the complainants obtain what they seek, or would the decree of the Court below be obeyed, if the defendant Railway Company should refrain from any action whatever? Clearly not. The complainant seeks to obtain the continued performance of affirmative acts by the Railway Company, and no amount of juggling with words can make this fact other than it is. The decree, though partly negative in form, is in reality a mandatory decree to do continuous affirmative acts, and on this ground is open to the same objections as if it were mandatory in form. In effect the decree requires the Railway Company forever to maintain and operate the machine shops and car works at the City of Marshall. To order the company never to cease doing certain acts is precisely the same thing as to order the company forever to continue to do those acts. The effect of the decree, and not the form of language, is the test as to its negative or affirmative character.

The case of *Hooper vs. Broderick*, 11 Sim., 47, well illustrates this point. The lease in question in that suit contained a covenant "to use and keep open the demised premises during the term as an inn." An injunction was granted restraining the defendant from discontinuing, during the term, to use and keep open the premises as an inn. But the Vice-Chancellor (SHADWELL) dissolved the injunction, saying:

"The Court ought not to have restrained the defendant from discontinuing to use and keep open the

demised premises as an inn, which is the same, in effect, as ordering him to carry on the business of an innkeeper."

Pullman Palace Car Company vs. Texas and Pacific Railway Company, 11 Fed. Rep., 625, illustrates the same principle. This was a suit for specific performance of a contract which provided for the running of complainant's cars over the lines of defendant Railway Company. The complainant obtained a temporary injunction (p. 620) enjoining and restraining the defendant "from *discontinuing* the use and employment" of complainant's cars. The question was whether the injunction should be continued *pendente lite*. The Court (PARDEE, J.) dissolved the injunction, and, in the opinion, said:

"Any injunction issued in this case and granting relief to the complainant, whether mandatory to compel the performance or prohibitory to restrain the violation of the contract on the part of the defendant, substantially amounts to a decree or order for the specific performance of the terms of the contract. * * *

"A decree restraining the defendant from violating the contract, amounting, as it would, to a mandate to comply with the contract, compels the Court to supervise and control the performance of continuous covenants, with intricate details, running through a period of nine years, over a vast system of railways, involving large discretion and the employment of an army of expert agents and business men, 'unreasonably taxing the time, attention and resources of the Court and its officers, and interfering in the general administration of justice' (see Pomeroy, Cont. & Spec. Perf., Secs. 307 *et seq.*; also *Marble Co. vs. Ripley*, 10 Wall., 358, and 13 Ohio St., 344)."

The only ground upon which the complainant in the present case could ask the Court to decree performance by way of injunction as of a negative covenant

would be that the contract contains an express or implied covenant *not* to maintain its eastern terminus, Texas office, main machine shops and car works elsewhere than at Marshall. If it be conceded, for the sake of the argument only, that this position is correct, then the contract is clearly contrary to public policy. It could not even be made the basis of an action for damages, much less would the Court enforce specific performance.

Marsh vs. Fairburg, Pontiac & N. W. Ry. Co., 64 Ill. 414.

St. Jos. & D. C. R. R. Co. vs. Ryan, 11 Kansas, 602.

Williamson vs. Chicago, R. I. & Pac. R. R. Co., 53 Iowa, 126.

These cases are referred to at length under Point V. *infra*.

But there is no negative covenant as to *all* the offices, machine shops and car works of the defendant railway company. It is shown, *infra* Point VI., that there was no contract to keep the main machine shops and car works *permanently* at the city of Marshall, but only to construct them there. But even if it be conceded that there was such a contract as to the "main machine shops and car works," as well as to the "eastern terminus and Texas office," still it is true that *there is no contract not to construct and maintain other termini* (whatever be meant by that term), *other offices, and other machine shops and car works.* The contract would still be only to keep the "*eastern*" terminus, the "*Texas*" office, the "*main*" machine shops and car works at the City of Marshall; and there is at most an implied negative covenant only as to

these things. The Railway Company, without violating the contract, might maintain *other* termini, offices, machine shops and car works elsewhere. The injunction as it stands in the decree or any injunction based on the view that there is a negative covenant which may be enforced by injunction, makes it necessary for the Court if called upon to see that its decree is obeyed, shall examine and ascertain as to all the Railway Company's offices, machine-shops and car works, and decide what the "*Eastern*" terminus, the "*Texas*" offices and the "*main*" machine shops and car works are, and whether they are kept at Marshall. This sort of investigation would have to be repeated every time the company made any change in its offices or shops; and the Court must continue such a process indefinitely to the end of time, in order to see that its decree is obeyed.

The authorities are clear that the Court will not undertake to enforce specific performance of an implied negative covenant in such a case.

Mr. Pomeroy (Specific Performance, § 308) says:

"*A continuing covenant* will not be negatively enforced by an injunction restraining its breach, when the acts alleged to be in violation of it are numerous, and each one of them would require a separate judicial examination—perhaps an action at law—in order to ascertain whether it constituted a breach or not, and where the same controversy would arise with respect to every violation of the injunction; as, for example, a covenant not to sell water from a certain well *to the plaintiff's injury*. In such a case, each alleged breach would require a separate controversy of fact. An injunction, in the very terms of the covenant restraining "sales to the injury of the plaintiff," would not remove the difficulty, because the same question would arise upon every breach of it, viz., whether the plaintiff *was in fact* injured; and *an injunction restraining all sales*

would be broader than the covenant. The same obstacles would arise in the way of negatively enforcing every other covenant or agreement of the kind described.

In *Collins vs. Plumb*, 16 Vesey 454, the negative covenant was not to sell or dispose of water from a well to the injury of the proprietors of the water-works.

The Lord Chancellor (ELDON) refused an injunction. He said (p. 459):

This Court will interfere in many cases to restrain a breach of covenant; but I never met with such a covenant as this; upon which I must try in each instance whether the act of selling the specified quantity of water is a predjudice to the proprietors of these water-works. I cannot imagine what jurisdiction a court of equity can have upon such a covenant."

After considering other features of the case the eminent Chancellor continues:

"Upon another ground, however, it (specific performance) is impossible. From the breach of a covenant, for instance, not to carry on a particular trade within five miles of London, the law implies some damage and injury to the party; and without an estimate the jury necessarily give some damages. This, however, is a covenant, not against selling the water of this well, but against it to the injury of the proprietors of these water-works; and, those words being infused into the covenant, the plaintiff at law must prove, not only, that the covenant is broken, but that it is broken in a sense represented as injurious. Many cases may be supposed in which the water might be sold without any injury to them; and it is accordingly contended that the injunction, which is the object, ought to go, not to prevent their selling water to the inhabitants of Gosport and Portsmouth, or the navy, but to prevent their doing so to the injury of the plaintiffs' water-works. Observe the situation of the defendant. Upon every application to commit for breach of the injuction, the only mode of giving effect to the decree, a trial must in each instance be directed, to

ascertain, whether that act, which might be done without injury to the plaintiff, has been done without injury."

To the same effect is *Caswell vs. Gibbs*, 33 Mich., 331, where the contract was " never to tow vessels in competition with the plaintiff " ; the Court holding that the contract could not be enforced by injunction, since every instance of alleged breach would require a separate investigation, in fact, to ascertain whether the defendant's act was really in competition with the plaintiff.

So, in the present case, every alleged breach of the present contract would require a separate and tedious investigation, as above stated (pp. 34–35), to ascertain whether the contract was being performed.

V.

The contract was void as against public policy, and, therefore, will not be specifically enforced.

The Railway Company, as a corporation exercising public functions and having special privileges for this purpose, is bound so to conduct its affairs as will best serve the public. Any contract which disables it from doing so is void, and will not be specifically enforced. If the contract in the present case, as complainant claims, binds the Railway Company to keep its eastern terminus, Texas office, main machine shops and car works in a certain city forever, regardless of future

events and circumstances, then it must be regarded as *pro tanto* an alienation of its ability to perform its duty to the public. Events have shown that this has been the practical result of this contract, and, as stated in the answer of defendant herein (Record, pp. 31, 32), the company was on this account compelled to move certain of its offices to other places where it could transact its business in a manner more economical and more to the advantage of the public.

Though a contract merely to construct a station or other railroad works at a certain place in consideration of a grant of land or bonds might not be contrary to public policy, because nothing in such a contract would bind the company permanently to maintain such station or other works at that place in case it became for the interest of the Railway Company or of the public to discontinue such station and maintain one elsewhere, yet a contract to keep such station or other works at such place *forever* is contrary to public policy, because such a contract would interfere with the Railway Company in the discharge of its public duties.

As Mr. GREENHOOD (Public Policy, p. 323), well says:

"It may be seen at a glance that there is a wide distinction between a promise to keep a depot in a certain place *for all time* and a subscription conditioned upon the erection of such depot in a certain place. The former binds the corporation to remain where it is, though the traffic may move away, while the latter binds it only to presently erect."

Marsh vs. Fairburg, Pontaic & N. W. Ry. Co., 64 Ill., 414, is a case directly in point. The facts are sufficiently stated in the opinion of the Court, delivered by Mr. Justice SHELDON:

"This was a bill in chancery, filed to enforce the

specific performance of a contract made by the Fairbury, Pontiac and Nothwestern Railway Company 'to locate passenger and freight depots of said road in Marsh's addition to Fairbury, and at no other point in said town.'

The Court below sustained a demurrer to the bill, and dismissed it.

This is not a case which concerns merely the private interests of two suitors. It is a matter where the public interest is involved. Railroad Companies are incorporated by authority of law not for the promotion of mere private ends, but in view of the public good they subserve. It is the circumstance of public use which justifies the exercise on their behalf of the right of eminent domain in the taking of private property for the purpose of their construction. They have come to be almost a public necessity, the general welfare being largely dependent upon these modes of inter-communication, and the manner of carrying on their operations.

The specific execution of a contract in equity is a matter not of absolute right in the party, but of sound discretion in the Court; and in deciding whether specific performance should be enforced against a railway company, the Court must have regard to the interests of the public. *Raphael vs. Railway Co.*, 2 Law Rep., 2 Eq. Cases, 37. The location of railroad depots has much to do with the accomodation of the wants of the public.

And when once established, a change of affairs may require a change of location, in order to suit public convenience.

We cannot admit that an individual is entitled to call for the interference of a court of equity to compel a railroad company to locate unchangeably its depot at a particular spot to subserve the private advantage of such individual.

Railroad companies, in order to fulfill one of the ends of their creation—the promotion of the public welfare—should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require.

To grant the relief asked for by the complainant, we would regard as against public policy, and he must be left, for whatever remedy he may have, to his suit at law for damages.

The Court below properly sustained the demurrer, and dismissed the bill."

See, also, Bestor vs. Wathen, 60 Ill., 138.
St. Louis, J. & C. R. R. Co. vs. Mathers, 71 Ill., 592.

In *St. Joseph & Denver City Railroad Company vs. Ryan*, 11 Kansas, 602, an action at law for damages, the Court (BREWER, J.) states the point decided as follows (p. 608) :

" The case turns upon the validity of this instrument. Can a Railroad Company, in consideration of the right of way, bind itself to build a depot on the grounds through which the right of way is obtained, and not to have or use any other depot within a given distance ? Is a contract not to build or use a depot within certain limits a valid and binding contract ? Railroad companies are private corporations ; yet they are declared to be *quasi* public agencies, and their roads to subserve, to a certain extent, public purposes, so much so that the public may be taxed to aid in their construction (*Leavenworth Co. vs Miller*, 7 Kas., 479). It would seem to follow that the public has a right to say that they shall not be permitted, though private corporations, to make any contract which would prevent them from accommodating the public in the matter of transportation and travel. The contract sued upon is a continuing one, to last through all time ; and if valid, no matter what may be the changes of population or the demand of business, the company is restrained from having or using other than the one depot within the limit of six miles. That at the time of the contract there was but a scanty population in the vicinity cannot affect the question, for no one can foresee where or how population may centre in the future. Eighteen years ago no one could foretell the present size and population of Atchison, Leavenworth or Topeka ; yet like contracts, if valid, might to-day operate to deprive each of them of the facilities of depots. And if the present amount of population does not affect the question, can a railroad company contract not to furnish any given community through which its road passes with the conveniences of a depot, and not to use one if fur-

nished by others? Can the Missouri Pacific Railroad contract with the Town of Delaware not to build or use a depot at Leavenworth? or with the Town of Lawrence not to build or use a depot at Leavenworth; or with the Town of Sumner not to build or use one in Atchison? Can it thus contract to force trade and travel out of its natural and selected channels? The question is an important one, and deserves, as it has received, careful consideration at our hands. That railroad corporations do by the construction and management of their roads alter materially the course of trade and travel is obvious. That in their management they come far short of accomodating the public, or supplying its necessities, no one will question. In the road they build, the route they select in the purchase of the right of way, the location of depots, the running of trains, the amount and character of the rolling stock—in short, in the whole organization, construction, management and machinery of railroads, the corporators have an eye to private interests and pecuniary gain. There is nothing in this peculiar to railroad corporations. All corporations, private in their nature, do the same. Self-interest controls all their operations. It so happens that self-interest and the interest of the public, as a general rule, demand the same course of action. The more the wants of the public are supplied, the greater the use it will make, and thus the greater the gains of the corporators. Hence, there are not many cases in the books in which the contracts of railroad corporations have been declared void as against public policy. Railroad corporations are, as we have seen, public agencies, and perform a public duty. They are agencies created by the public, with certain privileges, and subject to certain obligations. A contract that they will not discharge, or by which they cannot discharge those obligations, is a breach of that public duty, and cannot be enforced. They are under obligations to use the utmost human sagacity and foresight in the construction of their roads to prevent accidents to passengers. A contract that they will not use such sagacity and foresight, certainly cannot be upheld. They are under obligations to employ skillful and competent engineers to manage their engines, and other competent employees to superintend and take care of the running of their trains. A contract that they will not employ such agents and servants is certainly void. They are bound to furnish

reasonable facilities for the transportation of freight and passengers, both as to the quality and quantity of cars and coaches and the number of trains, and a contract not to furnish such facilities will not be tolerated. So, though one train a day with one freight car and one passenger coach might be at present amply sufficient to do all the business between two given places, yet a contract never to run but the one train a day with the one car and coach, could not be upheld, for the necessities of trade and travel are varying, and it is the duty of the company to adjust its capacities and facilities for business to these varying necessities. Upon the same principle it is the duty of a railroad company to furnish reasonable depot facilities. The number and location of the depots, so as to constitute reasonable depot facilities, vary with the changes and amount of population and business. A contract to leave a certain distance along the line of the road destitute of depots, is in contravention of this duty. The case of *Fuller vs. Dame*, 18 Pick., 472, is in principle very much in point."

To the same effect are :

Pacific Railroad Company vs. Seely, 45 Mo., 212.

Williamson vs. Chicago, R. I. & P. R. R. Co., 53 Iowa, 126.

See, also, Greenhood on Public Policy, p. 316, *et seq.* ; and cases cited.

In *Fuller vs. Dame*, 18 Pick. (Mass.), 573, a note the consideration for which was an agreement to induce a railroad company to locate its station in the vicinity of certain lands, was declared void. In giving the opinion of the Court, Chief-Justice SHAW said (p. 582) :

" It is obvious that if one large bondholder may make a valid conditional promise to pay a large sum of money to a stockholder, or influential citizen, on condition that a work of great public improvement

may be so fixed as to enhance the value of his estate, all other great landholders may make like promises, or similar conditions, and great public works which should be conducted with a view to the public interest and to the just rights of those who make advances for the public benefit, would be in danger of being overlooked and sacrificed in a mercenary conflict of separate local and private interests." * * *

"Without considering other aspects of the contract, we are of opinion that it was contrary to public policy and to upright and fair dealing, as it tended injuriously to affect the public interest in establishing the fittest and most suitable location for the termination of the Worcester railroad, for the accommodation of public travel." * * * "The Boston and Worcester Railroad was established for public accommodation and convenience in the transportation of passengers and merchandise. * * * It may be said that it was to be constructed and located by the corporation. True, as in case of a turnpike road it is constructed in the first instance at the expense of a private company of adventurers under the sanction of the Legislature, incorporated for that express purpose, and they are to be reimbursed by a toll, levied and regulated by law for their remuneration. The work is none the less a public work, and the public accommodation is the ultimate object. It is also true that it was left to the corporation and the directors to fix the termination and place of deposit. In doing this a confidence was reposed in them acting as agents for the public."

So, in the present case, the defendant Railway Company is bound to exercise its franchise and conduct its business for the benefit of the public along the whole of its route, and any contract whereby it undertakes to do anything which may disable itself from thus performing its duty to the public is void. It cannot thus sacrifice the interest of the entire public for the benefit of a particular locality.

If the contract to establish permanently the "*eastern terminus*" at Marshall be construed to mean that the

company agreed thereby not to extend its railway beyond Marshall, the contract was in this respect void as against public policy.

Greenhood on Public Policy, p. 318, Case VI.

H. & N. R. R. Co. vs. N. Y. & N. H. R. R. Co., 3 Robt. (N. Y.), 411.

State vs. Hartford and New Haven R. R. Co., 29 Conn., 538.

VI.

There was no contract PERMANENTLY to maintain the "main machine shops" or "car works" at the City of Marshall. The decree was clearly erroneous in this respect.

The contract as stated in the decree of the Court below (Record, p. 41), and in "Exhibit A," which was attached to and made part of the complaint in this suit, was:

"The said Texas and Pacific Railway Company will permanently establish its eastern terminus and Texas office at the City of Marshall, and will also establish and construct at said City the main machine shops and car works of said railway company."

It seems too plain for argument that the word "*permanently*," does not belong with or modify the second sentence in the above agreement. The ordinary rules of grammatical construction require this interpretation of the contract, and permit no other. If there could be any doubt on this point such doubt must be resolved in favor of the defendant Railway Company,

under the well known rule, that a writing is to be interpreted most strongly against the party who made it, which in the present case was the complainant.

Insurance Companies vs. Wright, 1 Wall, 456, 458.

Garrison vs. United States, 7 Wall, 688, 691.

Noonan vs. Bradley, 9 Wall, 394, 407.

VII.

The remedy of specific performance, even if it could be applied, would be harsh and oppressive to the Railway Company; if there is a valid contract and a breach thereof, the complainant has an ample remedy in an ordinary action at law for damages; and therefore specific performance should be refused.

The only reason why a court of equity enforces specific performance at all, is that it results in doing more perfect justice than can be done by a court of law in giving damages; and equity never enforces specific performance except for this purpose. *Cessante ratione, cessat ipsa lex.* It is always in the discretion of the Court to refuse the remedy of specific performance if for any reason the case is such that it would be inequitable to grant it, even if the case would be perfectly good in an action at law for damages. The complainant in such event is not remediless; the court of equity in effect merely says to him, "specific per-

formance will not be enforced in your favor, because the injustice which it would work to the other party more than counterbalances the good which it could do to you."

MR. POMEROY (Specific Performance, p. 3, Note 2) says:

"The nature and object of this equitable remedy was summed up in one sentence by Lord Chancellor SELBORNE, in the recent case of *Wilson vs. Northampton, &c., Ry. Co.*, L. R. 9, Ch. Ap., 279, 284 (referred to at length, *supra*, p 16): 'The principle which is material to be considered is, that the Court gives specific performance instead of damages, only when it can by that means do more perfect and complete justice.' The foundation and measure of the jurisdiction is the desire to do justice which the legal remedy would fail to give. This justice is primarily due to the plaintiff, but not exclusively, for *the equities of the defendant are also taken into consideration and protected.* Specific performance is therefore a conscious attempt on the part of the Court to do complete justice to both parties with respect to all the juridical relations growing out of the contract between them."

The effect of the decree granted by the Court below would be to require the Railway Company *forever* to keep its offices, main machine shop and car works in the City of Marshall, no matter what circumstances have arisen or might arise, or however burdensome and oppressive it might become for the Railway Company to keep them there. It requires but little reflection to see that this an extraordinary remedy, and that in the natural course of events it must inevitably prove to be a remedy of unusual hardship and oppression to the Railway Company. New and unforseen circumstances are constantly arising, especially in the operation of a large railway, so that not only the methods of business, but the buildings, offices and shops must be changed to

suit the changed circumstances. For a court thus to tie the hands of a railway company so as to prevent it from making such changes as are or may become necessary, would be highly unjust and oppressive; and for a court of equity, in the name of doing more perfect justice (which is the *raison d'être* of the remedy of specific performance), thus to tie the hands of the company for all time, would be a mockery of the functions of that Court, and a proceeding utterly unworthy of its name.

On this point—that the remedy of specific performance will not be granted where it will be harsh and oppressive—Mr. Pomeroy correctly states the law as follows (Specific Performance, § 185):

"Not only must the agreement be fair and reasonable in its terms and its surrounding circumstances, but it is also a well settled doctrine that its specific execution must not be oppressive—that is, the performance must not be a great hardship to the parties. This rule includes the one treated of in the last section, since every unfair contract is essentially unconscionable and hard, but it is more extensive, since the oppressive nature of the performance may result from the situation or relations of the parties exterior to and unconnected with the terms of the contract itself on the circumstances of its conclusion. The oppression and hardship, therefore, which fall within the scope of the doctrine may result from the unequal, unconscionable provisions of the contract itself, or from external facts, events or circumstances which control or affect the situation and relations of the defendant with respect to the performance. In either case the resulting hardship may constitute a sufficient ground for a court of equity to withhold its peculiar relief, and to leave the plaintiff to his legal remedy. The general doctrine also extends to the agreements of corporations, as well as to those of private persons."

See also the numerous cases cited by Mr. Pomeroy

in notes to the above section, among others, the case of *Willard vs. Taylor*, 8 Wall., 557.

VIII.

This Court should reverse the decree of the Circuit Court, and give directions to dismiss the bill, with costs.

This Court, for the reasons above stated, should reverse the decree of the Circuit Court and give directions to dismiss the bill.

JOHN F. DILLON,
HARRY HUBBARD,
For The Texas and Pacific Railway Company.

Supreme Court of the United States.

October Term, 1889.

THE TEXAS & PACIFIC RAILWAY CO.
vs.
THE CITY OF MARSHALL. } No. 293.

THE CITY OF MARSHALL
vs.
THE TEXAS & PACIFIC RAILWAY CO. } No. 1105.

W. HALLETT PHILLIPS,
of Counsel for City of Marshall.

R. O. Polkinhorn, Printer, Washington, D. C.

Supreme Court of the United States.

THE TEXAS & PACIFIC RAILWAY CO.
vs.
THE CITY OF MARSHALL.
No. 293.

THE CITY OF MARSHALL
vs.
THE TEXAS & PACIFIC RAILWAY CO.
No. 1105.

Brief of W. Hallett Phillips for the City of Marshall.

The appeal of the Railway Company brings up for review the decree of the District Court exercising Circuit Court powers for the Eastern District of Texas, rendered Oct. 7, 1886.

This finds that a contract existed between the complainant, the city of Marshall, and the defendant Railway Company, by which in consideration of the donation from Harrison County, Texas, of three hundred thousand dollars, in the bonds of the County, and sixty-six acres of land donated by complainant to the Railway Company, the latter agreed to permanently establish its eastern terminus and

Texas office, main machine shops and car works at Marshall, Texas.

The Court finds that the contract was executed anterior to the suit and that the complainant is entitled to have the same observed by the defendant.

It is therefore decreed that the defendant be enjoined from removing the eastern terminus of said railway company, the Texas office of said railway, the main machine shops and car works of said railway company, or any or either of the said offices, main machine shops, or car works from the said city of Marshall.

It is contended by the appellant company, that this decree is erroneous in granting any relief to complainant. The latter contends that the Court did not go far enough, but should, also, by way of mandatory injunction, have compelled the defendant to return to Marshall those departments of the Texas office, which the proof showed had been removed after the contract. That in addition the Court should have compelled the defendant to reestablish at Marshall the terminus of the freight and passenger divisions, which had also been removed. To correct the decree in these particulars the City prosecuted a cross-appeal.

Appeal of the Railway Company.

The bill filed by the city sought to obtain the relief that was accorded and that which was withheld.

It sought to enjoin the company from removing from Marshall its main machine shops, car works, Texas office, and Eastern terminus.

The contract between the company and the city is not denied. The rights asserted depend upon its construction.

The argument of the company is that the contract was fully performed by their establishing at Marshall the offices, machine shops, and terminus, and that there was no obligation to retain them; that the county and city simply relied on the faith that, once established, the interest of the company would induce their retention.

The question then is, whether the donation of the county of $300,000 of bonds, and that of the city of real estate costing $60,000, upon the consideration that the company would make Marshall the eastern terminus, and establish there its shops, car works, and Texas offices, left it in the power of the company, at any time after receiving the benefits of the contract, to abandon Marshall, make another place its terminus, and remove its Texas office and shops?

Certainly such a construction of the bargain cannot be made unless imperatively called for by its terms.

The first inquiry must be as to the extent and meaning of the contract.

The petition of the free holders of Harrison, upon which the election was ordered to determine whether the bonds should be issued to the railway, specifies "that the said donation, to be conditioned upon the fact that the eastern terminus of said railroad shall be permanently established at said city of Marshall (the county seat), with its Texas office and main shops."

This was the proposition submitted to the electors. R. 70.

The election being in favor of the issue, it was ordered by the County Court "that as soon as said Texas & Pacific Railroad Company shall permanently establish its eastern terminus at the city of Marshall. and shall also establish in said city of Marshall the Texas office of said railroad company, and shall also establish and construct at the city of Marshall the main shops of said railway," the Court would issue the bonds. R. 73.

Upon the petition of the company, that the conditions upon which the bonds were to be issued had been performed by the company, the bonds were issued. R. 73.

The company, in addition to the bonds, obtained from the city of Marshall, sixty-six acres of land whereon to locate the main machine shops, car works and depot, at said city. The land cost the city $60-000.

The letter of the city, acting through a committee of citizens, to the President of the company, Thomas A. Scott, refers to the action of the county, and pursuant to his request states the terms upon which the city will donate the land. "In consideration of the donation of the said sum of three hundred thousand dollars and said sixty-six acres of land, the said Texas & Pacific Railway Company will permanently establish its eastern terminus and Texas office at the city of Marshall, and will also establish and construct at said city the main machine shops and car works of said railway company."

The President acknowledges this letter "setting forth arrangement between your committee and myself, as President of the Texas & Pacific Railway Company. The statement as you make it is satisfactory, and I will have the matter ratified." R. 17.

In view of the contract as thus expressed, with what force can it be contended that the company had the right, whenever it suited its convenience and pleasure, to deprive the city of the advantages secured to it by the conditions upon which the donations were made.

The general prosperity and growth of the city were the objects of the donation. The conditions of the contract to be performed by the company were commensurate in their importance with the large expenditure incurred by the county and city. The establishments of the company were to be fixed at the city, and could not be removed by the company, unless acting in obedience to subsequent law applicable to the case.

If the contract is to be construed, as found by the court below, its invalidity is set up as a defense, "in so far as it attempts to prevent defendants from locating their shops and offices elsewhere, as being against public policy."

We have here the spectacle of a great company coming into a court of equity and saying that a contract which they induced the complainant to enter into, with full knowledge on their part, they had no right to make. They took advantage of it to obtain its benefit, and now urge its invalidity, when it is for their interest to escape from its obligation. The real complaint is, that a change of circumstances now makes the contract less beneficial to the company than when entered into; they no longer find it to their interest to continue to perform it.

In regard to the defense of illegality and those directed against the power of the court to prevent the

violation of the contract, it may be said that the position of a party retaining the consideration of a contract and seeking to evade its obligation, is certainly not a favorable one in a court of equity.

Public policy, generally a most unstable guide, should be very clearly established to prevent the court from interposing for the protection of the complainant, under such circumstances.

What, then, is the public policy governing the case?

The conditions to which the company consented were, we submit, such as the city had a right to accept and the company the right to offer. By the company's compliance therewith, the city would be largely benefited. There was ample authority to lend the aid and name the conditions. The company, on its part, had entire freedom of contract.

The policy, if any, governing the matter was announced by Congress in the organizing acts fixing the eastern terminus of the company at Marshall. Without additional legislation, the terminus thus established, could not be departed from, by the company.

Undoubtedly the stipulations of the contract, which in the first instance emanated from the company, were suggested by the provision of the acts making Marshall the terminus. All of the stipulations were in line and harmony with that provision.

Where the terminus was, there naturally would be located the offices and main works of the company.

There can be no question that the company was fully empowered to make the location wherever

they thought it most for their convenience and interest.

It is but fair to infer that every reason of "public policy" which could suggest itself why the contract should not be held to be in force, would be set up by the company as excuses for their violation of the contract in making the removals complained of by the city.

But in point of fact, while various reasons are stated in the answer of the company for their departure from the contract, they are all reasons founded on the convenience of the company and the economical administration of the road.

They are matters of private not public interest.

While the company owed a duty in this regard to the stockholders and others interested in the road, they owed a paramount duty to the community now before the court, which had the solemn sanction of a contract. To the observance of this contract every consideration of corporate interest and convenience must yield.

Assuming the contract to be legal, it is objected that equity is without jurisdiction. The argument seems to be that the company should be allowed to violate the contract and the city left to such redress as it may find in an action for damages.

But can it be the law that the city must give up all the public advantages secured to it by the contract and which constituted its sole consideration? Could any pecuniary compensation be the equivalent therefore?

It must be admitted to be very uncertain what damages could be recovered, unless, indeed, the amount is of the donation, a very inadequate recovery.

The remedy at law is not plain; it is not adequate nor complete.

The case seems to be peculiarly one in which the remedial and preventive jurisdiction of chancery can be invoked to prevent by injunction the consumation and continuance of an injury, which cannot be estimated and sufficiently compensated by a pecuniary payment.

Another objection to the decree is that the court has no adequate means of enforcing it, because the court cannot compel the company to maintain and operate the shops at Marshall ; that the decree is in effect one of specific performance.

But were it admitted that the court could not do complete justice to the city, that affords no sufficient reason why it should not repair, as far as lies in its power, the wrong inflicted and threatened, by an injunction, restraining the breach of the conditions of the contract, especially in a case like this where the defendant retains the full benefits resulting from the contract.

It is further objected that the decree is erroneous because the conditions of the contract are so indefinite as to be incapable of enforcement.

The reply is that the company itself is insisting that the contract was actually executed and fully performed when it established at Marshall its east-

ern terminus, Texas office, main machine shops and car works.

The appellant endeavors to show that the contract is so uncertain that a court of equity cannot cause it to be observed, and at the same time is insisting that it has faithfully been observed.

We say there is no ambiguity in the terms of the contract.

If there was any doubt, it has been removed. The contract has been acted on.

The maxim *certum est quod certum reddi potest*, is applicable. If there was any uncertainty in the terms used, the action of the company—*the party bound*—affords the means of ascertaining the signification of the same.

The company offered, in consideration of the aid, to permanently establish at Marshall their eastern terminus, Texas office, car works and main machine shops.

These conditions were accepted.

Before obtaining the aid they had to show, and did show, that they had done what they had promised to do.

The suit was to prevent the company from removing what they had established in performance of their contract.

The decree was limited to less than what was demanded. It simply enjoined the company from removing from Marshall the terminus office and works then remaining in the city.

The bill alleges that, in fact, the Texas office was not then in Marshall.

The answer denies this and insists "that while some departments were removed the principal office remained in Marshall." It admits that there were in Marshall all the offices, main machine shops and works alleged in the bill to be there, and they deny they intend to remove them. As to the terminus they deny anything in the contract prevented them from changing it.

In the face of these admissions, it would be highly inequitable to entertain an objection founded on the want of definity.

There is still a further objection to the jurisdiction.

It is said that it would be impracticable to enforce performance of the contract, "because, while in form an injunction, the decree is in effect a decree for specific performance of a contract which involves the employment of large numbers of men for an indefinite length of time, and also involves the exercise of personal skill and cultivated judgment and constant supervision, so that the Court has no adequate means of effectually enforcing its decree."

Certainly, where it appears, as in this case, that one party has had the benefit of a contract and seeks to escape its burden, equity will strain every power it has, to the full extent of law, in order to protect the other party, if it can be shown that the only adequate protection that can be afforded is the observance of the contract.

What the Court did was simply to enjoin the violation of the contract by making the removals complained of. It did not undertake specific performances.

In order to sustain the decree, it is not necessary to decide whether the contract is one which, in the first instance, equity would specifically enforce. We deny the agreement was such as is contended by appellant, or that obedience to the decree could only be enforced by undertaking the operation of the railroad. It is difficult to perceive why the court can. not prevent the renewal of establishments acknowledged to have been made under the contract.

But it does not follow that a party to a contract requiring performance of continuous duties, involving the exercise of skill, personal labor and cultivated judgment, which cannot be specifically performed, cannot be enjoined from restraining its breach.

> "It is now settled by the decided weight of authority, that in such cases, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach."
>
> McCrary J., *Western Union Tel. Co.*, vs. *Union Pacific R. R. Co.*, 3 Fed. Reporter, 429.

Appeal of the City.

This is prosecuted, on the ground that the Court should, by mandatory injunction, have compelled the company to restore to the city the offices forming part of the Texas office, and the terminus of the freight division, which the proof showed had been removed from Marshall after the date of the contract. Or the Court should have enjoined the defendant from maintaining such offices and terminus elsewhere than at Marshall.

If the construction the Court placed upon the contract was the correct one, it would seem necessarily to follow, that the complainant was entitled to the full relief now demanded. The fact that the breaches of the contract had already been inflicted, does not take away the power of the Court to interfere by a mandatory injunction. The continuing breach causes new damage so long as it is permitted.

It is unnecessary to enter here at large upon this discussion. The field has been covered in the brief of my associates.

The authorities there cited, support, in our judgment, every proposition necessary for the determination of the case in favor of the complainant.

W. HALLETT PHILLIPS.
of Counsel for City of Marshall.

Supreme Court of the United States.

THE TEXAS AND PACIFIC RAILWAY COMPANY, JOHN C. BROWN AND LIONEL A. SHELDON, RECEIVERS FOR THE TEXAS AND PACIFIC RAILWAY COMPANY,

vs.

THE CITY OF MARSHALL.

Brief of Appellee, City of Marshall.

JAMES TURNER,
C. B. KILGORE,
For the City of Marshall.

W A ADAIR PRINTER MARSHALL TEXAS

IN THE

Supreme Court of the United States.

THE TEXAS AND PACIFIC RAILWAY COMPANY, JOHN C. BROWN AND LIONEL A. SHELDON, RECEIVERS FOR THE TEXAS AND PACIFIC RAILWAY COMPANY,

vs.

THE CITY OF MARSHALL.

Brief of Appellee, City of Marshall.

On the first day of December, A. D. 1885, the City of Marshall, in Harrison County, Texas, filed in the District Court of said County, its original petition, against the Texas and Pacific Railway Company, and thus begun the suit out of which this appeal grew.

The material allegations of the Plaintiff's pleadings, are, briefly, that the Defendant Company, about the month of March, 1872, through its agents and representatives, proposed to the people of Harrison County, to establish, at the City of Marshall, the county site, the eastern terminus, Texas office, main machine shops, and car-works of the company, if the people of said county would donate to Defendant three hundred thou-

sand dollars in the bonds of said county, payable in gold, having thirty years to run, and bearing seven per centum per annum interest, and provide for the payment of the same by levying a tax in the manner required by an act of the Legislature of the State of Texas, entitled "An act to authorize counties, cities, and towns, to aid in the construction of railroads, and other works of internal improvements," approved April 12, 1871. As no question arises on the construction of said act, or as to the validity of said bonds, it is unnecessary to copy the law in this brief.

That the people of said county accepted said proposition, and in compliance with the terms thereof, and in conformity with said act of April 12, 1871, did donate said bonds, which were delivered to, and accepted by, said Defendant.

That after the proposition had been accepted, the Defendant, about June, 1872, refused to comply with it, unless the Plaintiff would convey to it about sixty-six acres of land, situated within the corporate limits. The Plaintiff, in compliance with this requirement, purchased said land, at a cost of sixty thousand dollars, and by deed donated the same to Defendant Company, which took possession of said land, and still has the use and occupation of same—the shops, car-works, offices, and Defendant's depot, were, about 1873, located thereon.

The contract was put in the form of a correspondence between a committee of three citizens of Marshall, and Thomas A. Scott, President of the Defendant Company; the letter of the committee is dated June 26, 1872; President Scott's answer thereto is dated July 19, 1872; and both are copied on pp. 16 and 17 printed record.

The Defendant, from the time of the location of its said shops, car-works, and offices, until September, 1881, complied with said contract, and maintained, at said city, the said shops, works, and offices, including the office of the Auditor, office of Vice President, office of General Freight Agent, office of Cashier and Paymaster, office of General Passenger Agent, office of Land Agent, office of General Stock and Claim Agent, office of General Master Mechanic and Superintendent of Machinery, office of Division Superintendent of New Orleans Division, office of General Superintendent of Eastern Division of Defendant's road in Texas, office of Chief Engineer and Superintendent of Bridges and Buildings, and office of Superintendent of Telegraphy. At the last named date the office of the Auditor, with the employes thereof, numbering one hundred, was, by said Defendant, removed from the City of Marshall; and at different times between September, 1881, and October, 1885, the offices of General Freight Agent, General Passenger Agent, Cashier and Paymaster, General Stock and Claim Agent, Master Mechanic and Superintendent of Machinery, Land Agent and Superintendent of New Orleans Division, were also removed by Defendant from said city. At the date of the institution of the suit there remained at said city, the offices of General Superintendent, Superintendent of Eastern Division of Defendant's road in Texas, Chief Engineer and Superintendent of Bridges and Buildings, and Superintendent of Telegraphy. The office of General Superintendent was, after the institution of the suit, about midnight on the 18th day of January, 1886, by said Defendant secretly removed from said city.

Under the contract, and the act of incorporation by Congress, the Defendant was also bound to establish permanently its eastern terminus at said city. The terminus of a freight and passenger division was made at said city, and so maintained by Defendant until about September, 1881, when the company changed the termini of its divisions so as to deprive said city of the operatives engaged in running the trains about two hundred in number.

That Defendant, from time to time, since September, 1881, up to the institution of the suit, had moved various pieces of important and valuable machinery from the shops at Marshall, which was done for the purpose of avoiding the performance of the contract.

That the number of employes who left the City of Marshall, in consequence of the removal was one thousand; the Defendant, before the offices were removed and the terminus changed, disbursed to said employes about seventy-five thousand dollars per month; and the petition avers "that the damages which it (the city) has sustained up to the present time (the date of filing suit) by reason of the wrongful acts, hereinbefore set out amounts to one million of dollars at least, and cannot be fully compensated by any amount of money, and, owing to the peculiar circumstances of the contract hereinbefore set out, said injuries are constantly recurring and are continuous in their nature, and will continue to accrue, from time to time, for all time to come; and, therefore, said damages are irreparable and incapable of estimation."

The prayer of the petition is "in consideration of the premises, and for that the Plaintiff is remediless ac-

cording to the strict rules of the common law; the Plaintiff prays that your honor's gracious writ of injunction, enjoining and restraining the Defendant, and all its agents and servants, from removing from the City of Marshall all of its offices, shops, and machinery, and portions of the same, which are now in said city, and have not heretofore been removed, until the further order of this court to be made herein," and, upon final hearing, your honor will decree that the Defendant shall be required in all respects to fulfil and perform its agreement and contract hereinbefore fully set forth, and that your honor will issue a mandatory writ of injunction requiring the said Defendant to restore and re-establish in the City of Marshall all of the offices, shops, and machinery, which have been removed therefrom. There is, also, the prayer for general relief. [Printed Rec., pp. 9–16.]

The petition containing the foregoing allegations, was, on the 27th day of November, 1885, prior to its filing, presented to the Hon. J. G. Hazlewood, judge of the fourth judicial district in [redacted] the State of Texas; and said judge, in chambers on said day awarded a preliminary injunction, restraining Defendant from removing any machinery from its shops at the City of Marshall, and from removing any of the offices which were there. [Ib. p. 18.]

On the 21st of January, 1886, the Defendant filed its petition in the District Court of Harrison County, praying for a removal of said cause to the Circuit Court of the United States for the Eastern District of Texas, and tendered the bond required by law in such cases. [Ib. pp. 22–25.]

On the 28th of January, 1886, the Plaintiff presented to Hon. Don. A. Pardee, judge of the Circuit Court of the United States for the fifth judicial circuit, its application setting forth the facts and history of the case as above given, and further avering that the Circuit Court for the Eastern District of Louisiana at New Orleans, on the 16th day of December, 1885, had appointed John C. Brown and Lionel A. Sheldon, receivers of the Defendant Company, and concluding with a prayer that the injunction of Judge Hazlewood be continued in force, and that the Plaintiff have permission to sue said receivers. [Ib. pp. 25–27.]

The Circuit Judge made in chambers an order dated January 28, 1886, continuing the injunction in force, and directing said receivers to enter their appearance upon the filing of the removal transcript in the Circuit Court at Jefferson. [Ib. pp. 27–28.]

The removal transcript of the cause having been filed in the Circuit Court at Jefferson, the Defendant Company, and the receivers, with certain other persons as to whom the cause was subsequently discontinued, and further reference to whom becomes unnecessary, filed, on April 12, 1886, their demurrer and answer to the petition. In this the contract, as alleged, is substantially admitted, but, it is claimed, that the County of Harrison failed to pay the interest on said bonds, and, in 1880, proposed to compromise with the holders of them by issuing new bonds for 50 per cent. of the old ones, and accrued interest not barred by limitation. It is claimed that the contract does not oblige the Defendant to maintain its eastern terminus, machine shops, and offices, at

Marshall, if the "general business" or "public interest" demand a change; that the fair and reasonable construction of the contract, is, that it provided only for the location of the shops, offices, &c., &c., at the City of Marshall, and, that being once established, "Plaintiff hoped that the interest of the Defendant, and that of the public, would continue the location as first established." Such, it is stated, was the understanding of Defendant as to the meaning of the agreement.

The Defendant also admits that the offices of Auditor, General Freight Agent, and General Passenger Agent, were removed from Marshall, as Plaintiff alleged, but claims that they were moved "to other points for the time being." Defendant Company having entered a combination, composed of the St. Louis, Iron Mountain and Southern Railroad, extending from Texarkana to St. Louis, and others which formed a through line from St. Louis to Galveston, allowed its said offices to be removed from said city for the convenience of said combination. That the Vice President's office was a part of the Texas office, is denied. The removal of the offices of Paymaster and Cashier, Stock and Claim Agent and Master Mechanic, is denied. That the office of Division Superintendent of the New Orleans Division, is a part of the Texas office, is denied. It is admitted that the Land Department of the Texas office has been moved to Dallas, Texas, for the reason, as given, that the lands of the Company lay west of Dallas, and it is more convenient for persons wishing to lease and rent to reach the last named place than Marshall. It is denied that Defendant intended to remove from Marshall any of the departments of the offices which were there at the institu-

tion of the suit, except the office of General Superintendent, which office was moved after the suit and after the appointment of the receivers, and before Judge Pardee's order. It is denied that any machinery was moved from the shops at Marshall. Finally, all fraud, fraudulent conspiracies, and unlawful combinations, are denied. [Ib. pp. 29-35.]

The Plaintiff filed the general replication, and the cause was set down for hearing, and heard, on bill, demurrer, answer, and evidence, the 5th day of October, 1886.

The evidence showed that the contract, on which the bonds of Harrison County were issued, was embodied in the petition to the County Court, to order the election to vote the subsidy. [Printed Rec., p. 71.] In the order of the Court for the election, [Ib. pp. 71-72.] in the judgment declaring the result of the election, [Ib. p. 73.] and in the judgment finding that the Company had complied with the contract, and ordering the issuance of the bonds. [Ib. p. 74.] The contract was recited in the deeds from the City to the Company. [Ib. pp. 35, 36, 37, and 75.]

The Company, in its application to the County Court, for the issuance of the bonds, alleged and on the trial proved that it had complied with the contract. [Ib. p. 64, Sexton's testimony.] The offices, which were afterwards taken away, were in Marshall at and before the said application was made, and before the issuance of the bonds. [Ib. p. 44, Kretz' testimony.]

Some of the subsidy bonds were paid to contractors, some retained by the Company, [Ib. p. 45,] some were

put in suit, which the County was compelled to pay, [Ib, pp. 67, 68, 69;] *in fine* all of the bonds, except such as Defendant needed to pay its tax, were negotiated. [Ib. p. 56, Turner's testimony.]

After the offices were moved, the population and real estate values in Marshall greatly decreased. [Ib. pp. 58, 59, Garrett's testimony; p. 57, Heartsill's testimony.]

On the 7th of October, 1886, the Circuit Court rendered its decree, the leading characteristics of which, are:

1st. It establishes the contract, declares its terms, and orders the same to be recorded.

2nd. It declares that the eastern terminus, Texas office, machine shops, *are*, and were established at the City of Marshall anterior to the commencement of the suit.

3rd. It enjoins the removal of the eastern terminus, or any or either of said offices, shops, or works.

4th. It does not determine what forms the Texas office.

5th. It does not provide for the restoration of those departments of the Texas office which had theretofore been removed.

6th. It makes no reference to the terminus of the freight and passenger division.

Both parties appealed from the decree, and Defendants have made nine assignments of error. The 1st, 2nd, and 3rd, are, that the Court, in its decree, did not define what constitutes the main machine shops, car-works, Texas office, and eastern terminus. The 4th and 8th, are, that the contract is not one of which a court of equity would decree specific performance. The 5th and 6th,

are, that Defendant Company is under the control of receivers, appointed by another court. The 7th, is, that the contract does not oblige the Defendant to maintain its shops, and offices, at Marshall, for all time. The 9th, is, to the point, that the contract is void, because, contrary to public policy, in so far as it attempts to prevent Defendant from maintaining its shops and offices, elsewhere, than at Marshall.

The assignments of error, made by the Plaintiff, will be taken up in that part of this brief, which presents the points sought to be raised by the cross-appeal.

The principal question, therefore, is, does the correspondence between the Marshall Committee and President Scott, the terms and conditions of which are recited in the various court proceedings, which led to the issuance of the bonds, and in the deeds to the lands donated by the City, form such a contract as will, under the circumstances of this case, be specifically enforced in a court of equity, by an injunction, mandatory in form and effect, or, by an injunction prohibitory in form, but mandatory in effect. This question is involved in both appeals, and, upon its proper solution, depends the disposition of the whole case, as to both parties.

As to the point of direct specific performance:

> "Where the remedy at law is not plain, adequate, and complete, equity will decree the specific performance of a contract, unless the agreement involves the exercise of skill or personal labor, or the performance, under the direction of the Court, of successive and continuous acts, for a considerable period of time."

High on Injunctions, 2nd Vol., Sec. 1106.
Wood's Railway Law, 1st Vol., p. 607, Sec. 210.
Pomeroy's Equity, Secs. 1402, 1403, 1405.
Story's Equity, Sec. 725, *et seq.*, and Secs. 1566-7-8.
Pomeroy on Specific Performance, Secs. 24, 25, 310, 311, 312.

In cases where equity might not decree specific performance of a contract, it will, if the injury is otherwise irreparable, restrain the breach of agreement, not only where it contains a negative covenant, but where such a covenant may be implied.

High on Injunctions, Secs. 1164, 1109, 1165, 2nd Vol.
Hascall vs. Madison University, 8 Barb., 174.
Singer Manufacturing Co. vs. Union Co., 6 Fish., 480; S. C., 1st Holmes, 253.
Wolverhampton and W. R. R. Co. vs. London N. W. R. R. Co., L. R., 16th Eq., 433.
Parsons on Cont., 3rd Vol., 6th Ed., p. 376, 1st para.
Montazere vs. Flockon, L. R., 16th Eq., 189.
Webster vs. Dillon, 3rd Jur., N. S., 432.
Gretrex vs. Gretrex, 1st DeG. and Sm., 692.
Note to Murdock's case, 20th American Decision, p. 392.
Rolfe vs. Rolfe, 15th Sim., 88.
Chicago and A. R. R. Co. vs. N. Y. L. E. W. R. R. Co., *et al.*, 22nd American and Eng. R. R. cases, p. 265.
Marble Co. vs Ripley, 10 Wall., 339.
People vs. Louisville and Nashville R. R. Co., Supreme Court, Illinois, Jan. 25, 1886, West's Rep., Vol. 3, No. 1, p. 90.

Western Union Tel. Co. vs. Union Pacific Co., 1st McCrary, 418, 558, 581.

Jones vs North L. R., 19th Eq., 426.

DeMatos vs. Gibon, 4th DeG. and Jur., 276-9.

Vincent vs. Chicago and Alton R. R. Co., 49 Ill., 33.

Frank vs. Branneman, 8 W. Va., 462.

Mining Co. vs. Virginia Water Co., 1st Sawyer, 470.

"It will not avail the Defendant that the work undertaken, in violation of the agreement, is one of great public importance, or that great inconvenience is likely to result to the public, in case he be compelled to perform his agreement."

High on Injunctions, Sec. 1135 2nd Vol.

Lloyd vs. London C. and D. R. Co., 2 DeGex. J. and S. 568.

Raphael vs. Thames R. Co. L. R. 2nd Ch. 147.

Foster vs. Birmingham R. Co., 2 W. R. 378.

The Defendant's assignments of error do not assert that the remedy at law is plain, adequate, and complete.

BRIEF ON CROSS-APPEAL.

The cross-appeal was perfected Nov. 4th, 1886, being same day on which the main appeal was perfected, and the transcript of the proceedings for cross-appeal and that for the main appeal, were embodied in the same record which was filed in this Court February 3rd, 1887. The main appeal was docketed at the last named date, but the cross-appeal was not docketed until March 5th, 1889, at which time there was a compliance with rules 9 and 10 for the Supreme Court:

Under this state of facts the City of Marshall, in order to obviate the application of the rule as to filing record, docketing, &c., laid down in the line of decisions, like the Osborne case, 105 U. S. p. 447, and prevent a dismissal of the cross-appeal, has filed in this Court the following affidavit:

"STATE OF TEXAS, }
HARRISON COUNTY. } Before me, Alexander S. Field, Clerk of the District Court in and for Harrison county, in said State of Texas, the same being a Court of record, on this day personally appeared James Turner and T. P. Young, known to me, and being by me sworn say on oath that they were the solicitors for the Plaintiff in the case of City of Marshall vs. Texas and Pacific Railway Co., Chancery No. 18, tried at Jefferson in the United States Circuit Court, October 7th, 1886, and as such then represented and have since represented, said Plaintiff; that F. H. Prendergast, Esq., represented the Defendant. That it was understood between the parties, and so stipulated in writing by their respective solicitors at the time the case was tried that each party should pay one-half the cost of the transcript on appeal; that both should have an equal right to said transcript on appeal; and that the whole case should be tried on the one record. That, in accordance therewith, Plaintiff did pay one-half of said costs, and allowed the Defendant's attorney to take charge of said transcript, to be filed and docketed in the Supreme Court of the United States. That said attorneys for Plaintiff did not learn that the cross-appeal of Plaintiff had not been docketed, until about March, 1889."

"The affiants attach to this affidavit the stipulations to which reference is herein before made.

"Sworn to and subscribed before me, this, day of January, A. D., 1890."

The facts shown by this affidavit bring the case within the exception established in Edwards vs. U. S. 102, U. S. p. 575, and Richardson vs. Green, 130 U. S., p. 104. And the cross-appeal should not be dismissed.

Secondly, the questions which are presented by the assignments of error made by the City on the cross-appeal [Printed Rec., pp. 8–9] are:

1st. That the Circuit Court erred in not enforcing the return of those departments of the Texas office which Defendant Company had removed from Marshall.

2nd. That the Court erred in not compelling the Defendant to make the City the terminus of its freight and passenger divisions.

The first question is involved in the assignments of error made by Defendant Company, and the authorities relating thereto will be found cited on pp. 11 and 12, of this brief, under the City's first and second propositions, submitted in answer to Defendant's said assignments.

The second question, as to the right of the City to be the terminus of the freight and passenger division, will be briefly considered here.

The City was the terminus of such division until about 1881, [Ib. p. 12] at which time the terminus was changed to another point on Defendant's road. [Ib. pp. 12, 50, and 61.]

The acts of Congress incorporating the Texas and Pacific Railway Company, approved March 3, 1871, and May 2, 1872, use the following language:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled—that John C. Fremont, James L. Alcorn, G. M. Dodge, &c., &c., &c., and all such per-

sons as shall or may be associated with them, and their successors, are hereby created a body politic and corporate in fact and in law, by the name, style, and title of the Texas Pacific Railway Company, and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all Courts of Law and Equity within the United States, and may make and use a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, from a point at or near Marshall, County of Harrison, State of Texas; thence, by the most direct and eligible route, to be determined by said Company, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence, by the most direct and eligible route, to be selected by said Company, through New Mexico and Arizona, to a point on the Rio Colorado, at or near the south-eastern boundary of the State of California; thence, by the most direct and eligible route to San Diego, California, to ship's channel, in the bay San Diego, in the State of California, pursuing in the location thereof, as near as may be, the thirty-second parallel of north latitude, and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act."

SEC. 17. "That the said Texas Pacific Railway Company shall commence the construction of its road simultaneously at San Diego, in the State of California, and from a point at or near Marshall, Texas, as hereinbefore described, and so prosecute the same as to have at least fifty consecutive miles of railroad from each of said points complete and in running order within two years after the pass-

age of this act; and to continue to construct each year thereafter a sufficient number of miles to secure the completion of the whole line from aforesaid point on eastern boundary of the State of Texas to the bay of San Diego, in the State of California, as aforesaid, within ten years after the passage of the act; and upon failure to so complete it, Congress may adopt such measures as it may deem necessary and proper to secure its speedy completion." [Acts and regulations of the Congress of the U. S., 1871, p. 210, and Sec. 17.]

SEC. 22. "That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have the right to connect by the most eligible route to be selected by said Company with the said Texas Pacific railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railway Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with the said Texas Pacific Railway Company at its eastern terminus, there is hereby granted to said Company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this act granted in the State of California, to said Texas Pacific Railway Company; and said lands shall be withdrawn from market, selected, and patents issued therefor, and opened for settlement and pre-emption upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railway Company, within said State of California: Provided, That said Company shall complete the whole of said road within five years from the passage of this act." [Acts

and resolutions of the Congress of the U. S., 1871, pp. 206 and 211.]

SEC. 5. "That the said Texas and Pacific Railway Company shall commence the construction of its road at or near Marshall, Texas, and proceed with its construction, under the original act and this supplement, or in pursuance of the authority derived from any consolidation as aforesaid, westerly from a point near Marshalll, and towards San Diego, in the State of California, on the line authorized by the original act, and so prosecute the same as to have at least one hundred consecutive miles of railroad from said point complete and in running order within two years after the passage of this act; and so continue to construct, each year thereafter, a sufficient number of miles, not less than one hundred, to secure the completion of the whole line, from the aforesaid point on eastern boundary of the State of Texas to the bay of San Diego, in the State of California, as aforesaid, within ten years after the passage of this act; and said road from Marshall, Texas, throughout the length thereof, shall be of uniform gauge: Provided, however, That the said Company shall commence the construction of said road from San Diego eastward within one year from the passage of this act, and construct not less than ten miles before the expiration of second year, and, after the second year, not less than twenty-five miles per annum in continuous line thereafter between San Diego and the California river, until the junction is formed with the line from the east at the latter point or east thereof; and upon failure to so complete it, Congress may adopt such measures as it may deem necessary and proper to secure its speedy completion; and it shall also be lawful for said Company to commence and prosecute the construction of its line

from any other point or points on the line; but nothing in this act contained shall be so construed as to authorize the grant of any additional lands or subsidy, of any nature or kind whatsoever, on the part of the government of the United States: Provided, That said Texas and Pacific Railway Company shall be, and it is hereby authorized and required to construct, maintain, control, and operate a road between Marshall, Texas, and Shreveport, Louisiana, or control and operate any existing road between said points, of the same gauge as the said Texas and Pacific railroad; and that all roads terminating at Shreveport shall have the right to make the same running connections, and shall be entitled to same privileges, for the transaction of business in connection with the said Texas and Pacific railroad as are granted to roads intersecting therewith: Provided further, That nothing herein shall be construed as changing the terminus of said Texas and Pacific Railway from Marshall as provided in the original act." [Acts and resolutions of the Congress of the U. S. 1872, p. 49, Sec., 5.]

The contract bound the Defendant to make Marshall its "eastern terminus." [Ib. p. 29, Defendant's answer; pp. 72, 73, orders of Court; 75, deed to land.]

1st. It was the duty of the Defendant Company to operate its road from the City of Marshall as its eastern terminus, and thereby make, according to said charter and contract that City a terminus of the freight and passenger division; the Circuit Court should have compelled, by mandatory injunction, the performance of this duty.

Union Pacific Railway Co. vs. Hall, 91 U. S., 343.

ARGUMENT FOR THE CITY OF MARSHALL.

While the assignments of error made by the Defendant do not controvert the position taken in the petition, that the injury is not reparable at law by an action for damages, it may not be inappropriate to briefly notice this question. The rule, as ordinarily expressed, is that the remedy afforded in a court of law must "be plain, adequate, and complete," in order to defeat the right to equitable relief. If it should be admitted that the Plaintiff, in an action for damages based on the grounds set out in the petition, could be fully compensated for the injury it has received, it still remains true that the citizens of Marshall, who, by paying the subsidy tax, are, in effect, parties to the contract, and entitled to its benefits, and who have invested hundreds of thousands of dollars upon the faith of the Defendant's promise, [Printed Rec., p. 57,] could not possibly, in such an action, receive any compensation for their losses. The City, whose inhabitants are beneficiaries of such a contract, is, upon equitable principles, the proper party to sue for the enforcement of the agreement, otherwise the Defendant, if each individual could sue, would be subjected to a multiplicity of suits, and interminable litigation. [Story's Equity, Sec. 901 a.]

But what rule of damages could afford adequate relief to the Plaintiff, if it had brought an action at law for the breach of the contract? If it should be said that the depreciation in the taxable values, caused by the removal of the offices, terminus, &c., would furnish a measure of damages by which the loss could be estimated, it can be answered that the benefits which were contemplated by the parties, and intended to be secured by the Plaintiff, as the immediate results of carrying out the contract on the part of the Defendant, were the convenience of having the Conpany's headquarters at Marshall, and the business prosperity of its citizens, as well as enhancement in real estate values. It cannot be successfully contended that the convenience and the prosperity are susceptible of estimation so as to furnish adequate relief—observance of the contract only can secure these.

Again, should it be said that the Plaintiff could, in case of the breach of such a contract, recover the consideration paid and interest, it can be answered that damages for the violation of a valid contract, cannot be adequate when measured by the consideration paid for the agreement. Such a rule would offer a premium to wrong—for, when the violating of the covenant would be more beneficial to a party than the money paid to him for it he would ignore the contract.

It certainly cannot be truly said that any remedy at law for the violation of such a contract as that set forth in the Plaintiff's pleading is plain, adequate, and complete.

The position assumed in Defendant's eighth assignment of error that the decree, in effect, restrains the violation of a contract, which the Court upon equitable principles can not specifically enforce, and is therefore erroneous, is contrary to the later and better considered authorities. This passing notice is here given this question, in order that the Court may be referred to the discussion in Chicago and A. R. R. Co. vs. New York, Lake Erie and Western R. R., 22nd Am. and Eng. R. R. cases pp. 270-1, where this point is considered, and ruled adversely to the position taken by Defendant.

It has been, and, doubtless will yet be, contended, that the contract set forth in the petition is too indefinite and uncertain to admit of enforcement in an equitable proceeding of the kind now before the Court. This difficulty, if any, is in the terms used to designate the subjects of the contract. These terms, viz: Eastern terminus, Texas Office, Main Machine shops and car works, will be considered separately.

The citations from the acts incorporating the Defendant Company, which are made on pages 15-19 of this brief, clearly manifest the intention of Congress to locate the eastern terminus "at or near Marshall." The pertinacity with which this intention is adhered to in the last proviso to the 5th section of the amendatory act, re-inforces the idea presented. The language, "at or near Marshall," also shows the intention of those laws to vest in the Defendant power to select, within limits implied from the language used, the *very point* of the terminus. Such being the case the contract set forth in the petition should be regarded as the absolute designation of the City of Mar-

shall as such terminus, so as to secure to the Plaintiff such benefits as Congress may be presumed to have intended should flow therefrom.

The most important of these is the duty, which the Defendant, by these acts, is under, to operate all of its trains from Marshall as its terminus, and thereby make Plaintiff the terminus of the eastern freight and passenger division. This it has failed to do since 1881. The right of the Plaintiff to insist upon the performance of this duty, is believed to be fully established by the decision of this Court in the case of the Union Pacific Railroad Company vs. Hall, 91 U. S., p. 343. If it should be contended that the duty, the performance of which is here sought to be enforced, is cognizable only in a mandamus proceeding before the law court, the answer is, that the Defendant has made this matter the subject of an express stipulation in the contract sued on, and thus connected it with the other subjects of that agreement, so as to bring the whole matter within the congnizance of a court of equity. In other words, this matter of the terminus has, by virtue of the contract, become a private right to the Plaintiff, and is not merely a duty to the public.

The question now arises as to what was meant by the term "Texas office," as used in the contract. The Circuit Court seems to have held that it included such departments of the main office as were at Marshall when the decree was rendered. This question ought to be controlled by the intention of the parties as shown by the contract, and their acts under the same from the time the proposition was accepted, up to and including the

judgment of the County Court, which provided for the issuance of the bonds.

The Defendant Company, after the acceptance of the proposition made by it, located all of the departments of the Texas office at Marshall, including those which were removed, and those not removed at the time of the trial; and all these offices or departments were made the subject of allegation and proof in the trial before the County Court when the bonds were issued. [Ib. Rec. pp. 64-74.]

The bonds were issued upon the claim, then made by the Company, that the offices since removed, were located in compliance with the contract, and, upon this the Defendant obtained the bonds. The Defendant should now be estopped to deny that these offices came within the meaning of the contract, since they procured the issuance of the bonds on the representation that they did.

But, aside from this view of the subject, it can hardly be said with any degree of truthfulness, that the Defendant's Texas office means anything less than its Texas headquarters; nor can it be asserted that its Texas office, in any sense in which the term can fairly be used, is now at Marshall. The City has, since the issuance of the bonds, been deprived of nearly all the offices which formed the Defendant's headquarters when the subsidy was obtained. Its Texas Office is elsewhere, in plain violation of a valid contract under which it was to be kept at Marshall.

The interpretation of the contract in so far as it is necessary to ascertain the meaning of the terms "Texas

office," "main machine shops and car-works," and eastern terminus, should, upon principles announced by this Court in the case of Chicago vs. Sheldon, 9 Wall. 54, be determined by the practical construction which the Defendant, up to 1881, put upon the contract:

"In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the Court as the true one." [Ib.]

Up to and including the year 1881, and in 1874, when it procured the issuance of the bonds, the Defendant had its headquarters at Marshall, including its principal offices, since removed, and had there also the terminus from which it operated its trains. When these facts, which are shown by the record, are considered, it can no longer be a matter of doubt, or uncertainty, what meaning the parties attached to the terms used. [See Nash vs. Towne, 5 Wall. 699; Railroad Co. vs. Trumble, 10 Wall. 367.]

It is not amiss to refer in this connection to a line of decisions, which may be thought to apply to

the contract on which the Plaintiff [redacted] relies. It is that class of cases, in which it has been held, that a contract by a railroad company to locate a depot at a certain point, and *at no other place* within a specified distance of such point, is void and contrary to public policy. A summary of the cases bearing on this question will be found in 1st Vol. of Wood's Railway Law, pp. 534-538, Sec. 184, and Sec. 187, p. 540; also, R. R. Co. vs. Robards, 60 Texas, 545. The reason upon which this doctrine proceeds, is, that stations are the means by which the railroad performs one of its most important duties to the public, viz: the reception and discharge of freight and passengers at such points as the commerce of the country may require. If the companies could restrict themselves in this respect it is apparent that one of the objects had in view in creating such corporations would be defeated. But the contract on which this suit is based, is not within either the letter or spirit of the rule. It does not prevent the Defendant's locating its stations at any place the business of the country requires. It does not relate to any of the duties which Defendant is under to the public, and it *does* relate exclusively to the private matters of the Defendant, over which it has full control.

The location of the Texas office, main machine shops, car-works, and eastern terminus, is a question in which the commerce of the country has no interest. If it has, the acts incorporating the Defendant has designated the point at which they should be established.

If, for any reason, the Court should be of the opinion that the contract can not be specifically enforced and

the Company compelled by an injunction mandatory in form and effect to maintain its headquarters at Marshall, no reason is seen why the Defendant, according to the principle laid down in the case of the Singer Manufacturing Co. vs. Union Co., 6 Fish. 480, S. C., 1st Holmes 253, should not be restrained from maintaining the offices of the General Superintendent, Auditor, General Freight Agent, General Passenger Agent and Land Department, which form the Texas office, at any point other than Marshall, and thus prevent the violation of the contract. In this decision it is said :

"If the case is one in which the negative remedy of injunction will do substantial justice between the parties by obliging the Defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate and there is no reason of policy against it, the Court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce specific performance of it." [1 Holmes, 253, 258. S. C.; 6 Fish. 480] "and such relief may be granted, although the contract contain no negative or restrictive claim." [High on In., Sec. 1164.]

So far as the machine shops and car-works are concerned, the decree of the Circuit Court is in accordance with the prayer of the petition, and is thought to be sustained by the principles announced in the authorities hereinbefore cited.

In consideration of the foregoing, we ask that the judgment enjoining the removal of the shops and offices now at Marshall be affirmed, and that a mandatory injunction be issued compelling the restoration to Marshall of the offices removed.

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C. B. KILGORE,
For the City of Marshall.

T. P. Young
also for the City